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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 379. 67

THE KANSAS PACIFIC RAILWAY COMPANY, PL[illegible]
IN ERROR,

vs.

LEWIS DUNMEYER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED OCTOBER 10, 1881.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 379.

THE KANSAS PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

LEWIS DUNMEYER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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1 In the Supreme Court of the State of Kansas.

Be it remembered that on the 25th day of February, A. D. 1880, there was filed in the office of the clerk of the supreme court of the State of Kansas a case made from the district court of the county of Saline, which is in words and figures as follows, to wit:

2 "A."

STATE OF KANSAS, } ss:
Saline County, }

In the District Court, sitting in and for said County.

LEWIS DUNMEYER, Plaintiff,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, Defendant.

Case Made.

Be it remembered that on the 11th day of November, A. D. 1875, Lewis Dunmeyer, the plaintiff above named, brought a suit against the Kansas Pacific Railway Company, in the district court of the fourteenth judicial district of the State of Kansas, sitting in and for the county of Saline, by filing his petition in the office of the clerk of said court on that day. And that afterward, and on the 16th day of April, 1878, by leave of the court, said plaintiff filed an amended petition, a copy of which is as follows:

Amended Petition.

The State of Kansas, in the District Court of Saline County.

LEWIS DUNMEYER, Plaintiff,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, Defendant.

The said plaintiff alleges:

That at the times hereinafter mentioned, said Kansas Pacific Railway Company was a railway corporation, duly organized
3 and existing under and by virtue of the laws of the State of Kansas, and that the said defendant, on the 12th day of November, 1870, by its deed of that date, sealed with its seal, and duly executed and acknowledged on the 23rd day of November, 1870, in consideration of $200.00, granted, bargained, sold, and conveyed to the said plaintiff, and his heirs and assigns, forever, certain lands, in the said deed particularly described, in fee simple; and the said defendant did, by said deed, covenant with the said plaintiff, his heirs and assigns, that it, the said defendant, would warrant and defend the said premises against the lawful claims of all persons whatever; and the said defendant by said deed did covenant and warrant and agree to defend the possession to the said premises, with the appurtenances, to the said plaintiff, his heirs and assigns, forever; and the said plaintiff says that the said defendant did not, and would not, after the execution and delivery of said deed, warrant and de-

fend said premises, and the possession thereof, against the lawful claims of all persons whatsoever, but, on the contrary thereof, the said plaintiff avers that the said defendant had not then, at the execution of said deed, a good and sufficient title to the said premises, but that the freehold and paramount title in the said premises was then and has continued to be, up to the ouster and disposition hereinafter stated, in the Government of the United States, and said premises liable to entry and settlement, under the homestead and pre-emption laws of the United States, to all persons who possessed the proper qualifications, and by virtue of which said paramount title and the hostile assertion thereof the said plaintiff was afterwards, to wit, the 16th day of October, 1871, ousted and dispossessed of the said premises, contrary to the said deed and covenant of the said defendant, and to the damage of the said plaintiff, $500.00. That a copy of the said deed is hereto attached, marked Exhibit "A," and made a part of this petition, and that the said
4 plaintiff is now a resident of Saline county, Kansas, wherefore the said defendant (?) prays judgment against the said defendant for the said sum of $500.00, with interest thereon from the 12th day of November, 1870, and his costs of suit.

FOSTER AND BANKS,
Attorneys for Plaintiff.

EXHIBIT "A."

This indenture, made this twelfth day of November, A. D. one thousand eight hundred and seventy, by and between the Kansas Pacific Railway Company, of the first part, and Lewis Dunmeyer, assignee, of Cambria county, State of Pennsylvania, of the second part, witnesseth:

That the party of the first part, in consideration of the sum of two hundred dollars, duly paid, the receipt whereof is hereby acknowledged, has granted, bargained, and sold, and by these presents does grant, bargain, sell, and convey to the said party of the second part, his heirs and assigns, forever, all that part and parcel of land situate in the county of Saline, State of Kansas, to wit, the west half of the southeast quarter and the east half of the southwest quarter of section twenty-five, in township thirteen south, of range two west, of the sixth principal meridian, containing one hundred and sixty acres, be the same more or less, to have and to hold the said tract of land, with all and every the appurtenances thereto belonging, unto him, the said Lewis Dunmeyer, his heirs and assigns, forever.

And the said Kansas Pacific Railway Company covenants with the said Lewis Dunmeyer, his heirs and assigns, that the possession of the said premises, with appurtenances, to the said Lewis Dunmeyer, his heirs and assigns, will forever warrant and defend.

In witness whereof, the said Kansas Pacific Railway Company has caused these presents to be signed by its president and attested by its secretary, with the seal of the corporation attached, twenty-

third day of November, A. D. one thousand eight hundred and seventy.

[SEAL.] JOHN D. PERRY, *President.*
CHAS. B. LAMBORN, *Secretary.*

THE STATE OF MISSOURI, }
City and County of St. Louis, } *ss:*

On this 23rd day of November, A. D. one thousand eight hundred and seventy, before me, the undersigned, A. C. Calef, commissioner, resident in the city of St. Louis, duly commissioned and qualified under the law of the State of Kansas to take acknowledgments of deeds, personally came John D. Perry, president of the Kansas Pacific Railway Company, personally known to me to be the same person who executed the foregoing instrument, and acknowledged the execution of the same.

[SEAL.] A. H. CALEF,
Com's. for Kansas.

Afterwards, and on the 1st day of November, A. D. 1878, leave of court having been first obtained, the defendant duly filed its answer to the amended petition in this cause, a copy of which answer is as follows:

Answer to Amended Petition.

STATE OF KANSAS, }
Saline County, } *ss:*

In District Court, sitting in and for Saline County.

LEWIS DUNMEYER, Plaintiff,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, Defendant.

1. For a first ground of defense to said petition, the defendant says that the lands in the amended petition mentioned are parcel of the lands granted to the defendant in aid of the construction of its road, by virtue of several acts of Congress, being an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean and to secure
6 to the Government the use of the same for postal, military, and other purposes," approved July 1st, 1864, and the acts amendatory thereof, and that by virtue of said acts the defendant, having performed the conditions thereof, became entitled to and was the owner of said lands; that being such owner, defendant, on the 17th day of December, A. D. 1869, sold the same to one G. W. Miller, and on the same day executed to him an agreement for a deed to be made to him thereafter. A copy of said agreement, with the endorsements thereon, is hereto attached, marked "A," and to be here read as a part of this answer, the same as though copied here at length. That the said Miller entered into the possession of said lands under his purchase from the defendant, but did not afterwards appear to receive the deed in said agreement stipulated for, although

the defendant was ready and willing to execute the same, but assigned said agreement to John Geis on the 18th day of January, A. D. 1870, which assignment was endorsed on the agreement, a copy of which is hereto attached as Exhibit "A," and to be here read as a part of this answer, the same as though here copied in full. And the said John Geis being in possession of the said lands, having taken the same under the said assignment to him, afterwards and on the 5th day of November, A. D. 1870, sold the said lands to the plaintiff and G. B. Dunmeyer for $1,120.00, and put the plaintiff and said G. B. Dunmeyer into possession of said lands under said purchase from said Geis, but the said Geis did not assign the said agreement to the plaintiff and G. B. Dunmeyer, and only assigned the same to the plaintiff herein, which assignment was endorsed on said agreement, a copy of which is Exhibit "A," and to be read here the same as though here set out at length. That the said plaintiff presented to the defendant the agreement to Miller hereinbefore mentioned, with the assignment thereon, and requested that a deed should be made to him of said land by the defendant under said agreement, and the same was so made, and is the same deed mentioned in the petition in this cause. That the plaintiff did
7 not pay the defendant anything at any time for said deed. That at the time of making the same, and for a long time before, and ever since, he and G. B. Dunmeyer have been in the quiet and peaceable possession of said land; that they entered into possession under their purchase from said Geis. Whereupon the defendant says that the plaintiff and G. B. Dunmeyer, John Geis and G. W. Miller are estopped from alleging or maintaining that his and their possession have been in any way or manner disturbed or from alleging any other outstanding claim, right, or title to said lands.

2. For second ground of defense defendant says that said deed in the petition mentioned was executed by the defendant without any consideration whatever being paid therefor by the said plaintiff or any one in his behalf.

3. For third ground of defense defendant says that at the time of the execution of said deed there was no such corporation as the Kansas Pacific Railway Company, and that at that time the defendant had no right or authority to execute said deed under the name of the Kansas Pacific Railway Company. That at that time the name of the corporation now known as the Kansas Pacific Railway Company was the Union Pacific Railway Company, Eastern Division, and under that name alone it had authority to act.

4. For a fourth ground of defense defendant denies each and every allegation in said petition contained, and each and every part thereof, except such as has been hereinbefore expressly admitted.

Wherefore defendant prays judgment for costs.

JOHN P. USHER AND
CHAS. MONROE,
Att'ys for Defendant.

8 "A."

Land Dep't, Kansas Pacific Railway Company. No. 1937.

LAWRENCE, KANSAS, *Dec.* 17, 1869.

This certifies that George W. Miller, of Saline county, in the State of Kansas, has this day purchased of the Kansas Pacific Railway Company the following described tracts of land, to wit: E. ½ of S. W. ¼ and W. ½ of S. E. ¼ of section twenty-five, in township thirteen of range two west, in the State of Kansas, containing, according to the United States survey, one hundred and sixty $\frac{1}{100}$ acres, for two hundred dollars, and has paid to the said railway company the sum of two hundred dollars, being the full amount of the purchase money therefor; that a deed, with the reservation of rights of way and other covenants used by the company in conveying their lands, as soon as the same can be prepared and executed, shall be delivered to the said purchaser upon the surrender of this certificate at this office, and in the meantime this certificate shall entitle said purchaser to the full possession and occupancy of said land.

In witness whereof, this said company has caused this certificate to be signed by the commissioner and secretary of the Land Department, the day and year above written.

[SEAL.] J. P. DEVEREUX, *Commissioner.*
SAM'L J. GILMORE, *Secretary.*

Acres, 160; dollars, 200.

STATE OF KANSAS, } ss:
Saline County, }

I, George W. Miller, the within-named purchaser, for value received, hereby assign and transfer all my right, title, interest
9 and claim in and to the within-described tract or parcel of land unto John Geis, his heirs and assigns, forever.

Witness my hand, this 18th day of January, A. D. 1870, in presence of A. S. Norton.

G. W. MILLER.

Taken and acknowledged before me, a clerk of the district court in and for Saline county, Kansas, the day and year last above written.

[SEAL.] A. S. NORTON, *Clerk.*

STATE OF PENNSYLVANIA, } ss:
County of Cambria, }

For value received, I, John Geis, the above-named purchaser, do hereby assign and transfer all of my right, title, interest, and claim in and to the tract or parcel of land described in the attached certificate unto Lewis Dunmeyer, his heirs and assigns, forever.

Witness my hand, this 5th day of November, 1870.

JOHN GEIS.

Witness:
WM. ROBINSON.

Subscribed and acknowledged before me, a notary public in and for said Co. and State, the day and year above named.

[SEAL.] A. MONTGOMERY, *N. P.*

The third ground of defense of the foregoing answer was, before the trial of the cause, by stipulation withdrawn.

Leave of court having first been obtained, on the 14th day of November, A. D. 1879, the plaintiff filed his reply in the office of clerk of said court, a copy of which reply is as follows:

Reply to Answer to Amended Petition.

In the District Court of Saline County, Kansas.

10 LEWIS DUNMEYER, Plaintiff,
against
THE KANSAS PACIFIC RAILWAY COMPANY, Defendant.

And now comes the said Lewis Dunmeyer, plaintiff, and for a first cause of reply to the said answer to amended petition of said defendant alleges:

First. That the matters, allegations, and things as set forth in the first ground of defense in said answer, do not state facts sufficient to constitute a defense to the cause of action set forth in plaintiff's petition.

Second Cause of Reply.

And for a second cause to reply to the first cause of defense in said answer, plaintiff says that he denies that G. B. Dunmeyer ever received any interest in, or right or title to, or possession of, the said land mentioned in plaintiff's petition, either directly or indirectly from said defendant. And plaintiff further alleges that a patent has been issued by the United States to one G. B. Dunmeyer for said land, which said patent was duly executed and issued, and is in words and figures as follows, to wit:

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, Greeting:

Whereas, in pursuance of the act of Congress, approved July 2, 1862, entitled "An act donating public lands to the several States and Territories which may provide colleges for the benefit of
11 agriculture and the mechanic arts," there has been deposited in the General Land Office script No. 1029, for one quarter section of land in favor of the State of Texas, duly assigned by the proper authorities of the said State to G. B. Dunmeyer, the west half of the southeast quarter and the east half of the southwest quarter of section twenty-five, in township thirteen, of range two, west, in the district of lands subject to sale at Salina, Kansas, containing one hundred and sixty acres, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general: now know ye that there is therefore

granted by the United States unto the said G. B. Dunmeyer, as assignee, as aforesaid, and to his heirs and assigns, forever.

In testimony whereof, I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

[SEAL.] By the President, U. S. GRANT.
S. D. WILLIAMS,
Secretary.

L. K. LIPPUNK, *Recorder of the General Land Office.*

Recorded, Vol. III, page 184.

Third Cause of Reply.

And for a third cause of reply to the said answer, plaintiff says that he denies each and every allegation in said answer, and in each ground of defense of said answer contained, not expressly admitted by plaintiff in this reply, or in the said petition of plaintiff.

FOSTER & BANKS,
Attorneys for Plaintiff.

12 On the 24th day of September, 1878, the parties made and filed a stipulation, a copy of which is as follows:

It is hereby stipulated and agreed that the testimony contained and set forth in the printed copy of the case made for the supreme court in the above-entitled cause, which case was heard and decided on said case made in said supreme court, and is reported at page 539 in 19th Kansas Report, may be read in evidence in the new trial in said case, and may be read to the court and jury, and shall have the same force and effect as if introduced by witnesses and deposition. The right to introduce additional evidence by either party is hereby reserved, as also the right to object to the introduction of any evidence offered, because of its incompetency, irrelevancy, or immateriality.

FOSTER & BANKS, *Att'ys for Pl'ff.*
J. P. USHER,
CHAS. MONROE,
Att'ys for Def't.

This cause came on for trial on Dec. 2, 1879, at the November term of said court, and both parties having waived a jury, the cause was submitted to the court for trial, and pursuant to the foregoing stipulation the parties read the case made mentioned in said stipulation, each party making the objections and exceptions in said case made appearing.

In support of his case the plaintiff read the following evidence, to wit:

JOHN GEIS, being first duly sworn, testified as follows:

I know the plaintiff, Lewis Dunmeyer. (Deed from Kansas Pacific Railway Company to Lewis Dunmeyer is here shown witness.) I paid the money through the railway company for this deed. The company got $200. I think I paid the money in 1869; the deed was made later. Of the money I paid to railway company
13 one-half was mine, and the other half was Lewis Dunmeyer's.

Cross-examination:

I can't swear as I paid any money to the railway company. I might have paid it to their agent. I might have paid it to George W. Miller. I know George W. Miller. (Certificate of sale from railway company to Miller is here shown witness.) Think we got this certificate when we bought the land; the deed was made afterwards. I afterwards sold my half to G. B. Dunmeyer for $560.00. Lewis Dunmeyer paid me the money for G. B. Dunmeyer. I transacted the business for Lewis Dunmeyer, and received the deed for him. Don't know why the deed was made to Lewis Dunmeyer alone, and not to Lewis and G. B. Dunmeyer. I paid the money to the company, perhaps their agent, for this land. Paid them $200; the money paid, I think, in 1869. One-half of the $200 was mine, and one-half was Lewis Dunmeyer's. They, the defendant, got the money, and gave us a certificate to make a deed in a reasonable time.

Re-examination:

Geo. W. Miller was a homesteader of that land; he was living on the land when we bought it. The $200 went to the railroad company for this land.

Plaintiff then offered in evidence a deed from the K. P. R. R. Co. to Lewis Dunmeyer, a copy of which is attached to the copy of this amended petition hereinbefore set forth, which is here referred to and to be here read as a part of plaintiff's evidence, the same as though here copied at length. Objected to as incompetent, irrelevant, and immaterial. Objection overruled by the court. Exceptions duly taken.

Thereupon the plaintiff offered in evidence the documents, in words and figures as follows:

No. 1.—Referred to.

Abstract of Homestead Entry of Geo. W. Miller and G. B. Dunmeyer upon W. ½ S.E. ¼ and E. ½ S.W. ¼ Sec. 25, T. 13, R. 2 West.

No. of application.	Date of application.	Tract entered.	No. of section.	No. of township.	No. of range.	Acres.	Name of applicant.	Residence.	Fees.	Commissions.	Remarks.
1439	July 25, 1866	E. ½ S.W. ¼ & W. ½ S.E. ¼	25	13 S.	2 W.	160	Geo. W. Miller	Saline Co., K's	$10 00	$4 00	Cancelled by Commissioner's letter, April 28, 1871.
11710	Oct. 16, 1871	W. ½ S.E. ¼ & E. ½ S.W. ¼	25	13	2 W.	160	G. B. Dunmeyer	Saline Co., K's	10 00	4 00	See Commissioner's letters, Sept. 14, 1871, do., Oct. 3, 1874.

U. S. Land Office, Salina, Kansas.—I hereby certify that the above is a true abstract of the homestead entry of Geo. W. Miller and G. B. Dunmeyer upon the above described tract of land, as shown by the record of this office. T. L. BOND, *Register of U. S. Land Office, Salina, Kansas.*

No. 2.—Referred to.—*Abstract of Col. Scrip Location, R. & R., 1339, G. B. Dunmeyer.*

Register's and Receiver's No.	Number of the scrip.	Scrip certificate. Date.	Scrip certificate. No. of acres.	In whose favor.	Tract located. Quarter section.	Tract located. Township.	Tract located. Range.	Date of location.	By whom located.	Remarks.
1339	1029	Feb. 16, 1871	160	State of Texas	W. ½ S.E. ¼ & E. ½ S.W. ¼ } 25	13 S.	2W.	Nov. 15, 1873	G. B. Dunmeyer	Com. home, No. 11710; see Com. letter "I," Oct. 3, 1874; do., Feb. 4, 1875.

United States Land Office, Salina, Kansas, *March 13th, 1876.*—I hereby certify that the above is a true abstract of ag'l col. scrip location of G. B. Dunmeyer upon the above-described tract of land, as shown by the record of this office.

T. L. BOND, *Register of U. S. Land Office, Salina, Kansas.*

15 To which evidence the defendant objects, as incompetent, irrelevant, and immaterial; which objection is overruled by the court, and the defendant duly excepts.

G. B. DUNMEYER
vs.
KANSAS PACIFIC R. R. COMPANY. } H. E. 11,710.

Involving the right to the E. ½ S. W. ¼ and W. ½ S. E. ¼ 25, 13, 2 W.

Notice issued Oct. 21, 1873. Case set by consent Oct. 25, 1873. Evidence submitted and sent to Washington.

UNITED STATES LAND OFFICE,
SALINA, KANSAS, *March* 13, 1876.

I hereby certify that the above is a true abstract of the contest docket in the case of G. B. Dunmeyer *vs.* Kansas Pacific R. R. Co., as now appears of record in this office.

T. L. BOND,
Register of U. S. Land Office, Salina, Kansas.

Endorsed: Abstract of contest docket in the case of G. B. Dunmeyer *vs.* K. P. R. R. Co.

To which evidence the defendant objects, as irrelevant, incompetent, and immaterial; which is overruled by the court, and the same is read in evidence, and to this defendant duly excepts at the time.

"F." U. J. B.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., *Oct.* 3, 1874.

Register and Receiver, Salina, Kansas:

GENTLEMEN: This office has considered the case of G. B.
16 Dunmeyer *vs.* The Kansas Pacific R. R. Co., involving the right to the E. ½ S. W. ¼ and W. ½ S. E. ¼ sec. 25, t'p 13, R. 2 W. This tract is within the limits of the grant to the above-named company, which took effect March 3, 1869. The records of this office show that George W. Miller made homestead entry No. 1439, for the tract, July 25, 1866. This entry was canceled April 28, 1871. G. B. Dunmeyer made homestead entry No. 11710, for the tract, Oct. 16, 1871, and commuted the same with ag'l coll. scrip location R. & R., No. 1339, November 15, 1873. From the evidence submitted, it appears that Mr. Miller entered upon the land within the time prescribed by law, that he erected a house thereon, and brought his family there as soon as practicable, and made the tract his home from the spring, 1867, until the spring, 1870.

It is considered that this claim is a valid one, which excepted the land from the operation of the grant.

The proof of residence on the part of G. B. Dunmeyer, and of his qualification as a legal claimant, are satisfactory, and his ag'l coll. scrip location R. & R., No. 1339, is held subject to approval for patent, you will give the parties interested due notice of this action, and allow sixty days for appeal.

Very respectfully, S. S. BURDETT, *Commissioner.*

U. S. LAND OFFICE,
SALINA, KANSAS, *M'ch* 13, 1876.

I hereby certify that the above and foregoing is a true copy of the original letter now on file in this office, rec'd by me from the Commissioner of the General Land Office.

T. L. BOND,
Register U. S. Land Office, Salina, Kansas.

17 To which defendant objected, as incompetent and irrelevant and immaterial; which objection was overruled by the court and the paper allowed and read in evidence; to which the defendant duly excepted.

Endorsed: "F." Oct. 3, 1874. G. B. Dunmeyer *vs.* K. P. R. R. Co. S. E. 25, [T.] 13, R. 2 west. In favor of plaintiff. Sixty (60) days for appeal. Parties notified Nov. 20, 1874. Ans'd Jan. 21, 1874. Vol. 2, p. 2287. U. J. B.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., *February* 4, 1875.

Register and Receiver, Salina, Kansas.

GENTLEMEN: I am in receipt of your letter of the 21st ultim., advising me that due notice was given the parties, and that no appeal had been filed from my decision of October 3, 1874, in the case of G. B. Dunmeyer *vs.* The Kansas Pacific Railway Company, involving title to the W. ½ S. E. ¼ & E. ½ S. W. ¼ 25, 13, 2 W. Accordingly, I have, this day, made decision final, and closed the case.

A. C. S. 1029, State of Texas, R. & R. No. 1339, located by said Dunmeyer on said W. ½ S. E. ¼ & E. ½ S. W. ¼ 25, 13, 2 west, is approved for patent.

You will so note on your records, and advise the parties interested of this action.

Very respectfully, S. S. BURDETT, *Commissioner.*

U. S. LAND OFFICE, SALINA, KANSAS, *March* 13, 1876.

I hereby certify that the above is a true copy of the orig-
18 inal letter now on file in this office, received by me from the Commissioner of the General Land Office.

T. L. BOND,
Register U. S. Land Office, Salina, Kansas.

Endorsed: "F." February 4, 1875. Approving coll. scrip. Location No. 1339. G. B. Dunmeyer notified M'ch 6, 1875.

To which evidence the defendant, objects as incompetent, irrelevant, and immaterial; which objection is overruled, and the same is allowed and read in evidence; to which the defendant duly excepts.

Plaintiff then offered in evidence the patent, a copy of which is attached to the plaintiff's reply.

To the introduction of said patent in evidence, defendant's counsel objected, as incompetent, irrelevant to the issue, and immaterial;

which objection was by the court overruled; to which ruling of the court the defendant's counsel then and there duly excepted.

The patent was then read in evidence, and the same is to be here read the same as if here set forth in full.

LEWIS DUNMEYER, being first duly sworn, testified as follows:

I am the plaintiff in this action. I own part of the land in controversy; one 80 of it; Samuel Crowell owns the other 80. I bought it from Gabe Dunmeyer last spring. It is part of the same land that I had bought before from the railroad company. I hold possession under my deed from Gabe, and not under my deed from the railroad company.

Cross-examination:

Gabe Dunmeyer is my son. I paid him about $900 for his land, counting interest and all. Don't think I paid him in money; it was the same as money; I held notes of his for money that I had lent him, and I gave him those notes. Mr. Geis and I bought this land together of Mr. Miller. (Certificate and endorsement, a
19 copy of which is attached to amended answer, shown him.) And he said he never saw this certificate. But Mr. Geis acted for me. Afterwards Gabe bought Mr. Geis' share. I had the money belonging to Gabe and paid Geis for him. This money that I paid to Geis is no part of the consideration of the deed from Gabe to me. When the deed was made to me by the railway company I was in Pennsylvania. Gabe came out and went on to this land the spring after the deed to me was made. The way Gabe came to go on this land, Gabe had determined to go to Kansas, and had no place to go to, and I told him that Mr. Geis and I had bought it, and if Mr. Geis was willing he could go out and live on it, and he did so; there was a house on it. When I bought I took possession. I never broke any. I was out here every year. This land is about twenty rods from the Kansas Pacific Railroad track. When I bought the 80 acres of Gabe, I bought his interest also in the deed from the Kansas Pacific Railway Company, or his claim against the said company, on account of the failure of title, and I then settled with him for it.

G. B. DUNMEYER, being first duly sworn, testified as follows:

I am the one who got the patent for the land; I contested it with the railroad company before the land office here. C. A. Hiller appeared in that contest as attorney for the railroad company. I was told it was Government land, at the land office, and other parties were talking of taking it, and I went and homesteaded it to save it. I paid $200 for the land and the fees, $19.50, at the land office. I mean this is what I paid the Government to get the land. When I sold the 80 acres to my father, Lewis Dunmeyer, I also sold him in the trade my right against the Kansas Pacific Railway Company in the deed from the railway company. They had deeded the land to my father, but I owned one-half of the land, and paid one-half the of money for the land. There was no agreement or under-

standing between me and my father that I should go on and
20 homestead this land in order to defraud the R. R. Co. I homesteaded [it] because I was informed at the land office that it was Government land, and the R. R. company had no right to it. I homesteaded it to save the land.

Defendant then read the following testimony:

It was admitted on the trial by the parties hereto that the defendant's name was duly changed from the Union Pacific Railway Company, Eastern Division, to the Kansas Pacific Railway Company, and before that from the Leavenworth, Pawnee and Western Railway Company to the Union Pacific Railway Company, Eastern Division.

Also admitted that the land in controversy is and was at all the times hereinbefore mentioned within ten miles of defendant's R. R. track.

G. B. DUNMEYER, being called on the part of defendant, testified as follows:

I sold half of this land to my father, Lewis Dunmeyer, over a year ago. He paid me for it in notes of mine that he held, for money borrowed; think he paid me some money. I bought half of this land from John Geis before I made homestead entry; paid in $560 for it. Lewis Dunmeyer paid it for me. John Geis told me he would deed the whole of it to my father, and he would make a deed to me, but never did. Think my father paid me $460 or $560 for the 80 he bought of me. The money he paid to John Geis for me was no part of this consideration. When I first went on to this land Mr. Geis and my father told me that they had bought it, and that there was a house on it, and I could go and live in it, which I did. I told Mr. Geis if I liked it I would buy it from him, and afterwards did so.

Defendant then read in evidence the certificate and assignment endorsed thereon, a copy of which certificate and endorse-
21 ment is attached to the copy of the answer hereinbefore set forth. Said copy of certificate and endorsements is here referred to, and to be here read as part of defendant's evidence, the same as though here copied at length.

All the foregoing testimony was read by the parties from said case made, there being no oral evidence offered or witnesses sworn at the trial. And after the parties had read the evidence in said case made to the court the defendant introduced certain record evidence, the force and effect of which is set out in an agreed statement of facts made and filed Dec. 2, 1879, a copy of which is as follows:

Agreed Statement of Facts other than as appear by the Case made referred to in the Stipulation herein.

LEWIS DUNMEYER *vs.* KANSAS PACIFIC R'L'Y CO.

It is agreed that the provisions of an act of Congress entitled "An act to aid in the construction of a railroad and telegraph line from

the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1, 1862, and the act amendatory thereof, approved July 2, 1864, were, by the defendant, at the time of the passage of the last named act, known by the name of the Union Pacific Railway Company, Eastern Division, upon the passage of said acts duly accepted.

It is further agreed that the defendant, pursuant to an act of Congress, entitled "An act to amend the act hereinbefore mentioned, approved July 1, 1862, and July 2, 1864," approved July 3,
22 1866, duly filed in the Department of the Interior on the 11th day of July, 1866, its map designating and showing the general route of its road from the eastern State line to the State line between Kansas and Colorado, which route and line of road, as shown on said map, along and adjacent to the lands in the petition mentioned is substantially the same as that on which the defendant's railroad was subsequently located and constructed.

It is further agreed that the line of defendant's railroad along and adjacent to the lands in controversy was definitely fixed September 21, 1866, and not till then.

It is further agreed that on the 14th of July, 1866, the Commissioner of the General Land Office, at Washington, addressed a letter to the local land office at Junction City, in which district the lands in controversy were then situated, advising them that a map of general route had been filed under act of July 3, 1866, and directing the local land officers to withdraw from sale homestead or preemption entry all the odd sections within 25 miles of the general route of defendant's road, as appears by said map; that the register of the local land office acknowledged the receipt of the Commissioner's letter on the 26th of July, 1866, as having been received of that date, and himself and receiver at the local office then entered upon the maps and plats in their office proper entries indicating the withdrawal of the public lands 25 miles on each side of the line of road as designated on the map of general route filed July 11 as aforesaid with the Secretary of the Interior.

JOHN FOSTER,
Att'y for Plaintiff.
J. P. USHER &
CHAS. MONROE,
Att'ys for Defendant.

23 Defendant here rested its case.

And the foregoing is all the evidence in the case.

Whereupon, on said Dec. 2, 1879, such proceedings were had, and such orders made in the cause as appears by a journal entry herein, a copy of which is, as follows:

LEWIS DUNMEYER, Plaintiff,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, Defendant.

Now, on this day, comes the plaintiff herein, by John Foster, his attorney, and comes the defendant, by J. P. Usher and Chas. Mon-

roe, its attorneys, and this cause coming on in its order for trial, and both parties waiving a jury, it is submitted to the court for trial. And the court, having heard the evidence adduced, and the arguments of counsel thereon, and being fully advised in the premises, now finds for the plaintiff, and assesses his damages at the sum of $326.45, with costs of suit; to which finding and decision of the court defendant excepts.

And thereupon, on the same day, the defendant having filed its motion for new trial for the reasons therein stated, said motion came on to be heard, and the court, having heard the arguments of counsel thereon, now overrules said motion; to which order of the court overruling said motion the defendant excepts.

24 Whereupon it is now here ordered, decreed, and adjudged by the court that the plaintiff do have and recover of and from the defendant a judgment in the sum of $326.45, and all his costs in this action expended, taxed at $——, and that execution issue therefor; to which ruling and decision of the court the defendant excepts; and, for good cause shown to the court, it is hereby ordered that the defendant herein have thirty days from this date in which to make a case for the supreme court, and serve the same upon his attorney of record, and the time for it in which so to do is hereby so extended.

On the 2d day of December, 1879, the defendant filed its motion for a new trial, which is the same motion mentioned in the foregoing journal entry, a copy of said motion is as follows:

Motion for New Trial.

STATE OF KANSAS, }
County of Saline, } *ss:*

In District Court.

LEWIS DUNMEYER, Plaintiff,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY, Defendant.

And now comes the defendant above named, The Kansas Pacific Railway Company, by John P. Usher, its attorney, and moves the court now here to vacate the decision by the court heretofore made in this case, and grant the said defendant a new trial herein for the following causes, affecting materially the substantial rights of said defendant, to wit:

I.

For that the decision by the court is not sustained by sufficient evidence.

II.

For that the decision of the court is contrary to law.

III.

Error of law occurring at the trial, and excepted to by
25 said defendant.

IV.

For other good and sufficient reasons, though not specially set forth or mentioned herein.

JOHN P. USHER,
Att'y for Defendant,
Pr. MOHLER.

The foregoing case made contains all the evidence in this cause, the pleadings, judgment, and all things necessary to show the errors complained of by the defendant.

J. P. USHER,
CHAS. MONROE,
Defendant's Attorneys.

Service of the foregoing case made acknowledged this 20th day of December, A. D. 1879.

JOHN FOSTER,
Attorney for Plaintiff.

Defendant agrees that plaintiff may have what time he chooses to suggest amendments, provided he causes no execution to be issued before suggesting amendments.

CHAS. MONROE,
Att'y for Def't.

I certify that the within case made contains a true and complete statement of the pleadings, evidence, and judgment, and of all other proceedings and matters in said action necessary to present the errors complained of in the supreme court; that the same was duly served on the attorney of record for plaintiff within the time required by the court, as appears by the acknowledgment hereto; that the plaintiff made no amendments to said cause made, and that both parties appeared before me on the 21st day of February, 1880, during the November, 1879, term of court, and said case was duly settled by me on that day; and I direct the same to be attested by the clerk, and the seal of the court to be hereto attached, and the case made to be filed in this case.

Feb. 21st, 1880.

J. H. PRESCOTT, *Judge.*

Attest:
[L. S.] NELS. PETERSEN, *Clerk D. C.*

Filed Feb. 21st, 1880. NELS. PETERSON, *Clerk D. C.*

THE KANSAS PACIFIC RAILWAY CO.
vs.
LEWIS DUNMEYER.
} No. 1899.

Filed Feb. 25, 1880.

C. J. BROWN,
Clerk Sup. Court.

Petition in error and case made.

J. P. USHER & CHAS. MONROE,
Att'ys for Pl'ff in Error.

26 And also, on to wit, the 25th day of February, A. D. 1880, there was filed in the office of the clerk of the supreme court of the State of Kansas the *petition in error* in the above-entitled cause, which is in words and figures, as follows, to wit:

27 *Petition in Error.*

In the Supreme Court of the State of Kansas.

THE KANSAS PACIFIC RAILWAY COMLANY, Plaintiff in Error,
vs.
LEWIS DUNMEYER, Defendant in Error.

The plaintiff in error respectfully shows to the court, that on the 2d day of December, A. D. 1879, in the district court of Saline county, Kansas, a judgment for the plaintiff for the sum of three hundred and twenty-six dollars and forty-five cents and costs of suit was rendered by said court, in an action wherein the defendant in error was plaintiff and plaintiff in error was defendant.

The case made filed in said court in said action is hereto attached and made part hereof, and marked "A."

The plaintiff in error alleges that said district court made the following errors in said action, duly excepted to at the proper time by defendant:

1. The court erred in admitting certain testimony offered by plaintiff.
2. The court erred in excluding certain testimony offered by defendant.
3. The court erred in overruling the motion of defendant for a new trial.
4. The court erred in rendering any judgment for plaintiff.
5. The court erred in rendering too large a judgment for plaintiff.
6. The court erred in not rendering judgment for the defendant, upon the evidence.

28 Wherefore plaintiff in error prays this court to reverse the said judgment, and to remand this case to the court below for a new trial thereof.

J. P. USHER AND CHAS. MONROE,
Attorneys for Plaintiff in Error.

29 And afterwards, on, to wit, the 9th day of March, A. D. 1880, there was filed in the office of the clerk of the supreme court of the State of Kansas a waiver of issuance and service of summons in error in the above-entitled cause, which is in words and figures as follows, to wit:

Supreme Court, State of Kansas.

THE KANSAS PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
LEWIS DUNMEYER, Defendant in Error.

Issue and service of summons in error in above-entitled cause is hereby waived.

M'ch 4th, 1880. JOHN FOSTER,
Att'y for Defendant in Error.

Endorsed: Kansas Pacific R'l'y Co. *vs.* Lewis Dunmeyer. No. 1899. Waiver of summons in error. Filed Mar. 9, 1880. C. J. Brown, clerk sup. court.

30 And afterwards, on, to wit, the 20th day of May, A. D. 1880, the same being one of the regular judicial days of the January term, A. D. 1880, of the supreme court of the State of Kansas, before said court in session at the supreme court-room in the city of Topeka—present, Hon. Albert H. Horton, chief justice; Hon. Daniel M. Valentine, associate justice; and Hon. David J. Brewer, associate justice; and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

Journal Entry.

THURSDAY, *May* 20, 1880.

THE KANSAS PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
LEWIS DUNMEYER, Defendant in Error.

This cause came on to be heard on petition in error and transcript of the record of the district court of Saline county, and was argued by counsel Chas. Monroe, Esq., for plaintiff in error, and John Foster, Esq., for defendant in error, and taken under advisement by the court.

31 And afterwards, on, to wit, the 6th day of January, A. D. 1881, the same being one of the regular judicial days of the January term, A. D. 1881, of the supreme court of the State of Kansas, before said court, in session at the supreme court-room in the city of Topeka—present, Hon. Albert H. Horton, chief justice; Hon. Daniel M. Valentine, associate justice; and Hon. David J. Brewer, associate justice; and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

Journal Entry.

THURSDAY, *Jan.* 6, 1881.

THE KANSAS PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
LEWIS DUNMEYER, Defendant in Error.

This cause came on for decision, and thereupon it is ordered and

adjudged that the judgment of the court below be *affirmed* with costs, and hereof let execution issue.

Brewer, J., delivered the opinion of the court, all the justices concurring.

32 And also on, to wit, the 6th day of January, A. D. 1881, the same being one of the regular judicial days of the January term, A. D. 1881, of the supreme court of the State of Kansas, there was filed in the office of the clerk of said court the *syllabus* and *opinion* of the court in said cause, a copy of which is hereunto annexed, which is in words and figures as follows, to wit:

33 *Syllabus.*

Error from Saline County. Affirmed.

THE K. P. R'W. CO. *vs.* LEWIS DUNMEYER.

By the court, BREWER, J.:

1. The mere acceptance of a deed by one in occupation of land, does not estop the grantee from questioning the title conveyed by that deed, or from suing on the covenants for failure of title, and this, notwithstanding such grantee had, at the time of receiving the deed himslf, a pre-emption right to the land. Such acceptance is not of itself proof of the settlement and compromise of a controversy.

2. July 25th, 1866, M. made a homestead entry of a tract of land. On July 11th, 1866, the railroad company, one of the companys named in the act of Congress of July 2, 1862, filed its map showing the general line of its road. On July 14 the Commissioner of the General Land Office wrote to the local land officers, advising them of the filing of this map, and directing the withdrawal of the lands along the line of the road, in accordance with the provisions of the act of Congress of July 3, 1866. This letter was received July 26th, 1866, and the same day the entries made of withdrawal. The land upon which M. had filed was in an odd-numbered section within the limits of this withdrawal. Afterwards the road was built, and on Dec. 17, 1869, M. purchased from the railroad company and took a certificate of purchase, which, after one or two assignments, passed into the hands of the plaintiff, and was by him surrendered to the company and a deed taken. April 28, 1871, M.'s homestead entry was canceled. But in October, 1871, D. made a new homestead entry. A contest was had before the land officers between D. and the railroad company, which was decided by the commissioner of the land office in favor of D. The company not appealing, the decision was made final, and a patent issued to D. *Held*, that the title conveyed by the patent to D. was paramount to any title passed to the company by its land grant.

All the justices concurring.

34 THE K. P. R. W. CO. *vs.* LEWIS DUNMEYER.

The opinion of the court was delivered by BREWER, J.:

This case has been to this court once before, and is reported in 19 Kas., 539. A judgment against the railroad company was then re-

versed, and the case remanded for a new trial. Subsequently the petition was amended to conform to the views expressed in the opinion then filed, and a second trial was had, resulting again in judgment against the railroad company, and this second judgment is now challenged by the plaintiff in error.

Two principal questions are presented, and they are all we deem it necessary to notice. It may be premised that the main facts appear now as they did when the case was here before.

The first proposition of counsel is that plaintiff is estopped from asserting that the title acquired from the Government by G. B. Dunmeyer and purchased by him is paramount to that acquired by him from the defendant. This proposition is rested upon the doctrine of the effect of a compromise of disputed rights, as laid down by this court in the case of The A., T. & S. F. R. R. Co. *v.* Starkweather, 21 Kas., 322. But compromise implies controversy. None appears here. The mere purchase of a title and acceptance of a deed is not necessarily a compromise, the settlement of a controversy, even though the party receiving the deed have, at the time, himself a different claim.

In the Starkweather case it appeared that the parties had a controversy; that this controversy was litigated in the Land Department of the United States, and decided adversely to Starkweather; that then, being out of funds and unable to carry on the litigation in another forum, and to prevent a sale by the railroad company, he went to the company and purchased. By that he settled and compromised a pending controversy, and we held that he was bound by that settlement.

In the opinion we referred to some cases in which the mere acceptance of a deed was held to estop from questioning the title apparently conveyed thereby, but expressed our dissent from the extreme views of those cases. Those cases are cited by counsel, and the contention is that the case at bar is stronger than either of them, and more within the scope of the reasoning in the Starkweather case. We cannot concur with counsel. The record before us fails to show any controversy between Miller, the original purchaser from the company, and the company. It simply shows that, having an occupation of the land, which might be the foundation of a title by pre-emption or homestead, he suffered that to go by default, and purchased from the company. He never contested with it the question of superior title. In fact, he had no title. He had a prior right to purchase or acquire title by occupation from Government, but that is all. Instead of purchasing from Government, he bought from the company, and this not by way of closing any litigation or settling any controversy, but doubtless because he then thought the company had title to convey. The company never attempted to disturb his possession, never, save in the mere act of receiving money and issuing a deed, asserted any claim to the land. In other words, before any controversy arose, he purchased. Now, unless the mere acceptance of a deed and payment for the title conveyed thereby is proof of a controversy and the settlement of it, this case shows no controversy or compromise.

Further, Miller, the original purchaser from the company, is not now a party in interest. He assigned his certificate of purchase, and after one or two assignments it passed into the hands of plaintiff, who surrendered the certificate and took a deed. In other words, plaintiff, not an original occupant of the land, and without, so far as appears, actual knowledge that there was ever any pre-
35 emption or homestead right thereto, finds a party holding a contract of purchase from the defendant and buys that evidence of title. That title, thus contracted for and afterwards conveyed by defendant, fails, and a paramount title is yielded to and purchased. It is not Miller's paramount title that was yielded to, but the Government's. Miller never had title, and by abandoning the land he lost the right to acquire title. He had nothing to convey and he gave no warranty. The defendant warranted, but had no title. It warranted to plaintiff and not to Miller. Miller's conduct neither bettered nor injured defendant's claim of title. Being on the tract with the intention of homesteading it, at the time defendant's grant attached, this tract never passed to the company. Whether Miller abandoned it or continued his occupation was immaterial. Defendant's title to lands within the strip is of a fixed date. At that date the alternate sections "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached," were identified. The title dates from the date of the grant, but the identification is of the time the line is definitely fixed. Then the float attached to the particular lands and the grant became as definite as though the various sections had been particularly named. The float ceased. The grant was exhausted. The lands designated. The company took, and could take nothing more, no matter what changes in title or condition of other lands might thereafter arise. The excepted lands did not and were not in any contingency to become its property. (M., K. & T. R'l'y Co. *v.* K. P. R'l'y Co., 97 U. S., 491.) "The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them. In other words, the grant was a float until the line of the road should be definitely fixed."

"And these lands being within the terms of the proviso, as we construe it, it follows that they are absolutely and unconditionally excepted from the grant; and it makes no difference whether or not they subsequently became a part of the public lands of the country."

L., L. & G. R. R. Co. *v.* U. S., 92 U. S., 733.

So that whether Miller maintained or abandoned his homestead entry and occupation after the time that the line of defendant's road was definitely fixed, in no manner affected its rights to the land.

The other contention of counsel is that, in fact, the company did have the title. The facts are, that on July 25, 1866, Miller made a homestead entry of the land. On the 3d of July, 1866, an act of Congress was passed providing for the filing of a map of the gen-

eral line of its road by the company defendant, and that "upon the filing of said map showing the general route of said road, the lands along the entire line thereof, so far as the same may be designated, shall be reserved from sale by order of the Secretary of the Interior." This act was but an extension of the right conferred by the original act of 1862, in which it was provided that upon the filing of the map of the general route, "the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry, and sale." 12 U. S., p. 493, Sec. 7. On July 11th the company filed its map. On July 14th the Commissioner of the General Land Office wrote to the local land officers to withdraw the lands from sale, homestead, and pre-emption entry, which communication was received by them on July 26th, and on that day the proper entries were made upon their maps and plats to indicate such withdrawal. The line of defendant's road along and adjacent to this land was not definitely fixed until September 21, 1866. On December 17, 1869, Miller purchased from the company, and took a certificate of purchase. On April 28, 1871, Miller's homestead entry was
36 cancelled. On October 16, 1871, G. B. Dunmeyer made a homestead entry. A contest arose before the land office between him and the company, which was decided by the commissioner in favor of Dunmeyer, and no appeal being taken to the Secretary of the Interior the decision was made final, and a patent issued to him. Now it is claimed that by the filing of the map the lands were withdrawn from market, and that no homestead or pre-emption right could thereafter attach. Hence, Miller's homestead entry was void, and the title passed by the grant to the company. We are inclined to think this view not correct. The lands are to be reserved from sale by order of the Secretary of the Interior, or, in the language of the prior act, he is to cause them to be withdrawn from sale, &c. This, it would seem, contemplates some act by the department, and, until that act was completed, the withdrawal was not made. No formal order of the Secretary is shown. The only thing is the letter from the Commissioner to the local land officers and their action. The land was then, in fact, withdrawn. Perhaps the order of the Secretary, if one was made, was to take effect upon the receipt by the local land officers of the notice and letter from the Commissioner. If so, it would seem to be within the scope of his powers; and, in the absence of other showing, this action of the subordinates of the Secretary of the Interior must be taken as, in fact, the order of the Secretary. The language concerning withdrawals differs from that respecting the grant. The latter is "that there be, and is hereby, granted," &c. It is absolute, depending on the action of no officer, and takes effect upon the passage of the act. 97 U. S., 491. The other casts a duty upon an officer of the Government. It does not provide that the lands shall be withdrawn upon the filing of the map and by virtue of that act alone, but that the Secretary shall cause them to be withdrawn when that map is filed; in other words, a duty is cast upon him and on the performance of that duty the withdrawal is complete. That duty,

so far as the record here shows, was completed on July 26th, and that is, therefore, to be taken as the date of the withdrawal. In the case of the K. P. R'l'y Co. *v.* M., K. & T. R'l'y Co. In this and the Supreme Court of the United States it seems to have been an unquestioned fact that July 26th was the date of withdrawal. 15 Kas., 20; 97 U. S. 491. True, that date was not one of moment, perhaps, in that case, and the expression in the opinions of the two courts concludes no one. Still it serves to show the general understanding of the scope and effect of the statute concerning withdrawals. The rulings of the Land Department of the United States have not been uniform, it is believed, upon this question, and Congress attempted by act of April 21, 1876, (U. S. Stat. 1876, p. 35,) to put an end to dispute. That act is in harmony with the conclusions reached by us.

It should also be noticed that the company litigated with Dunmeyer his right to homestead before the Land Office, and was defeated in that litigation. That decision, if based upon the construction of a statute or a question of law, may not be conclusive, but so far as it determines fact, it is, except in case of fraud, &c. Johnson *v.* Tousley, 13 Wall., 72. The record before us does not clearly and fully disclose the ground of the decision. The simple conclusion of the contest is about all that appears. The company's grant is spoken of as taking effect March 3, 1869. Upon what facts that conclusion is based, nothing in the record before us shows. It may be conceded, however, that probably the decision was based upon a construction of the statute upon undisputed facts. We do not rest our judgment upon that decision, but refer to it as an opinion in harmony with our own. While the question, it must be conceded, is doubtful, we think the ruling of the district court was correct, and that the title conveyed by the patent to Dunmeyer was in fact paramount to that of the company.

37 We notice no other questions of importance which were not in the case when here before, and then considered.

The judgment will be affirmed.

All the justices concurring.

38 And afterward, on, to wit, the 11th day of January, A. D. 1881, there was filed in the office of the clerk of the supreme court of the State of Kansas a writ of error in the above-entitled cause, the original of which is hereunto attached, and is in words and figures as follows, to wit:

39 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, and also in the rendition of a judgment of a plea which is in the said court of Kansas, before you or some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit between the Kansas Pacific Railway Company and Lewis Dunmeyer, wherein a title was claimed under a statute of the United States, and the de-

cision was against the title specially set up or claimed under such statute, a manifest error hath happened to the great damage of the Kansas Pacific Railway Company, as by its complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given,
40 that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States of America, this 11th day of January, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] A. S. THOMAS,
Clerk of the Circuit Court of the United States
for the District of Kansas.

Endorsed: 1899. K. P. R'l'y Co. *vs.* Lewis Dunmeyer. Writ of error. Filed Jan. 11, 1881. C. J. Brown, clerk sup. court.

41 And also, on, to wit, the 11th day of January, A. D. 1881, there was filed in the office of the clerk of the supreme court of the State of Kansas an appeal bond in the above-entitled cause, the original of which is hereunto attached, and is in words and figures as follows, to wit:

42 Supreme Court of the United States.

KANSAS PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
LEWIS DUNMEYER, Defendant in Error.

Know all men by these presents, that we, J. P. Usher, of Douglas county, Kansas, and A. L. Williams, of Shawnee county, Kansas, are held and firmly bound unto Lewis Dunmeyer, of Saline county, Kansas, in the sum of one thousand dollars, to be paid to the said Lewis Dunmeyer, his executors and administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, and our, and each of our, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated this 10th day of January, A. D. 1881.

Whereas the Kansas Pacific Railway Company has prosecuted a writ of error to the Supreme Court of the United States to re-
43 verse the judgment in the above-entitled action, rendered by the supreme court of the State of Kansas:

Now, therefore, the condition of this obligation is such that if the above-named Kansas Pacific Railway Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, and all just damages for delay and costs and interest, on the appeal, then this obligation shall be void; otherwise to remain in full force and virtue.

J. P. USHER. [SEAL.]
A. L. WILLIAMS. [SEAL.]

The above and foregoing bond, and the sufficiency of the sureties, approved by me, this 11th day of January, A. D. 1881.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of Kansas.

Endorsed: 1899. K. P. R'l'y Co. *vs.* Dunmeyer. Appeal bond. Filed Jan. 11, 1881. C. J. Brown, clerk sup. court.

44 And also, on, to wit, the 11th day of June, A. D. 1881, there was filed in the office of the clerk of the supreme court of the State of Kansas, a citation in the above entitled cause, the original of which, with the endorsement thereon, is hereunto attached, and is in words and figures as follows, to wit:

45 UNITED STATES OF AMERICA, *ss:*

To Lewis Dunmeyer, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein the Kansas Pacific Railway Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Albert H. Horton, chief justice of the supreme court of the State of Kansas, this 11th day of January, A. D. 1881.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

46 We hereby waive service of the within citation, and enter my appearance for Lewis Dunmeyer, defendant in error, in the Supreme Court of the United States.

JOHN FOSTER & J. G. MOHLER,
Att'ys for Lewis Dunmeyer, Def't in Error.

Service of the within citation is hereby acknowledged this 20th day of January, A. D. 1881.

JOHN FOSTER & J. G. MOHLER,
Attorneys for Lewis Dunmeyer, Defendant in Error.

Endorsed: 1899. Kansas Pacific Railway Co. *v.* Lewis Dunmeyer. Citation. Filed June 11th, 1881. C. J. Brown, clerk sup. court.

47 The State of Kansas, Supreme Court.

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a true and complete copy of the pleadings, of the record of proceedings had, of the judgment rendered, and of the syllabus and opinion filed, in the above-entitled cause, as the same remain of record and on file in my office.

In witness whereof, I have hereunto subscribed my name, and affixed the seal of the supreme court of the State of Kansas, at my office in Topeka, this twenty-fourth day of August, A. D. 1881.

[SEAL.] C. J. BROWN,
Clerk Supreme Court of the State of Kansas.

Endorsed on cover: Kansas sup. court. No. 379. The Kansas Pacific Railway Company, plaintiff in error, *vs.* Lewis Dunmeyer. Filed October 10, 1881.

113-629

OFFICE SUPREME COURT U. S.
FILED
APR 15 1884
JAMES H. McKENNEY, Clerk.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1883.

No. ~~379.~~ 67

THE KANSAS PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

LEWIS DUNMEYER, DEFENDANT IN ERROR.

BRIEF OF J. P. USHER FOR PLAINTIFF IN ERROR.

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IN THE SUPREME COURT OF THE UNITED STATES

THE KANSAS PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

LEWIS DUNMEYER, DEFENDANT IN ERROR.

This is a writ of error to the Supreme Court of the State of Kansas. The action was brought upon an alleged breach of covenant of warranty of title made by plaintiff in error to Dunmeyer, to the west half of the southeast quarter, and the east half of the southwest quarter of section twenty-five, in township thirteen, south of range two, west of the sixth principal meridian, said land being in Saline county, State of Kansas. The questions to be decided by this court arise upon the following

FACTS.

The lands above described are situated within one mile of the company's railroad (Dunmeyer's testimony, p. 12), within the limits of the grant to the company under the act of July 1, 1862.

July 3, 1866 (14 statutes at large 79) Congress amended said act of July 1, 1862, and authorized the company to designate the general route of its road, and to file a map thereof, as then required by law, and upon the filing of said map, showing the general route of its road. "*The lands along the entire line thereof, so far*

as the same may be designated, shall be reserved from sale by order of theSecretary of the Interior."

July 11, 1866, the company filed the authorized map with the Secretary of the Interior, and its railroad was afterwards located and constructed upon the line shown upon said map. (Agreed statement, p. 13 14.)

July 14, 1866, the Department of the Interior addressed a letter to the local land office at Junction City, in which district these lands were situated, advising them that a map of general route had been filed under act of July 3, 1866, and directing them to withdraw from sale, homestead or pre-emption entry all the odd sections within twenty-five miles of the company's road, as appeared by said map. The register of the land office acknowledged the receipt of said letter on the 26th of July, 1866, as having been received on that day. (Agreed statement, page 14.)

July 25, 1866, George W. Miller made application for homestead entry of the lands in question, at the local land office at Junction City (page 9), and afterwards entered into possession of the lands.

December 17, 1869, said George W. Miller purchased these lands of the company for $200. He afterwards, January 18, 1870, assigned his contract of sale, and the company afterwards executed a deed to an assignee of Miller's contract, who was then in possession of the land (p. 8–12), and it was for an alleged breach of covenant of this deed that this action was brought (p. 1–2.)

April 28, 1871, the homestead entry of said Miller was entered canceled in the general land office (p. 14.)

November 15, 1873, the department permitted G. B. Dunmeyer, then in possession under the company's grantee, to make homestead entry of the lands, upon which entry patent was afterwards issued to him (p. 14.)

Upon the foregoing statement of facts the Supreme Court of Kansas held,

1. That the grant of lands to the company under the act of Congress of July 1, 1862, did not embrace the land in question because the same had been entered by Miller before the letter directing withdrawal of the lands had been received at the local land office (p. 22.)

2. That Miller's entry *ipso facto* took the lands from the grant whether the same was a *bona fide* entry or not, and

3. That the act of Congress of July 3, 1866, did not inhibit the sale of the lands by the United States when the required map was filed with the Secretary of the Interior, but only from the time that the lands were withdrawn from sale at the local land office by order of the Secretary (p. 22–23.)

ASSIGNMENTS OF ERROR.

1. The plaintiff in error says that the Supreme Court of Kansas erred in holding that the land in question was not granted to the company by the act of July 1, 1862.

2. That said court erred in deciding that the homestead entry of George W. Miller absolutely took the lands from the operation of the grant.

3. That said court erred in holding that the act of Congress of July 3, 1866, did not restrain the Depart-

ment of the Interior from selling said lands after the filing of the map required by said act.

4. That said court erred in deciding that when the alleged homestead entry of George W. Miller was abandoned the said lands did not fall within the grant to the company under the act of July 1, 1862.

5. That said court erred in affirming the judgment of the district court of Saline county, State of Kansas, and plaintiff in error prays that the judgment of the Supreme Court of Kansas may be in all things reversed.

ARGUMENT.

The rulings of the Department of the Interior in adjusting the grant of lands for the Union Pacific Railroad have been conflicting to the last degree. For four or five years after the passage of the act of 1864 the uniform ruling was that pre-emption and homestead entries of the odd sections of land within the grant, when abandoned, left the lands to the grant, and this proceeded upon a construction of the fourth section of the amendatory act of 1864. The portion of that section upon which this ruling proceeded, is as follows:

"*And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land or other lawful claim.*"

After several years the department was urged to hold that every entry of land under the homestead or pre-emption laws, before withdrawal, or if there was no withdrawal, then before definite location of the road, excluded the lands from the grant and this though the entries were fictitious and colorable; and the depart-

ment so decided. This ruling was adhered to, both as to pre-emption and homestead entries. After a time the rule was relaxed as to pre-emption entries, and as to both classes of entries for the last six years the rulings of the Department have been quite contradictory.

This court has not hitherto had occasion to pass upon these decisions of the Department construing the grants to the Union Pacific company. It is true there is but little money involved in this cause, but the effect of the decision to be rendered will be of great moment to that Company and the branch companies, as well as to the public.

Many decisions have been made by this court giving construction to grants of land by Congress. The leading decision is that of *Wolcott* v. *Des Moines Co.*, *5 Wall.*, *681*.

The decision in that case was upon a statute peculiar and special in its terms, and made with special reference to a former statute, the exceptions and limitations of which were special. Some general observations made by Justice Nelson in that case, and only applicable to acts of Congress then under consideration, have been seized upon by officials in the Department of the Interior and trial courts, and made applicable to cases arising under dissimilar acts. Especially has this been done in construing the grants of land to the Union Pacific Railroad Company.

The decision of this court in the case of *M. K. & T. R'y Co* v. *K. P. R'y Co.*, *97 U. S.*, *491*, goes very far towards settling the proper construction of the granting acts of 1862 and 1864. By that decision these were in effect declared to be a single act, so far as the grant of lands was concerned. Mr. Justice Field said, page 407:

"It is true that the act of 1864 enlarged the grant of 1862; but this was done, not by words of a new and an additional grant, but by a change of words in the original act, substituting for those there used words of larger import."

Treating the acts as one, attention will now be directed to section 3 of the act of 1862, and section 4 of the act of 1864. In these sections are embraced the grant of lands and limitations. In section 3 the grant is described to be:

"Every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely filed."

Section 4, of the act of 1864, after stating the amendments, goes on:

"And any land granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swampland, or other lawful claim."

It will be observed that by section 3 there was excepted from the grant, lands upon which a homestead claim had attached at the time the line of the road was definitely fixed. This exception came, after several years, to be relied upon in the Interior Department, as authority for changing its former rulings; the construction given being that a pre-emption or homestead claim had attached, within the meaning of the act, whenever an application for entry had been made at the local land office. Thus the right of the railway company, grantee, was made to depend upon a matter of book-keeping. No matter whether the party applying for the entry was an alien, an infant,—disqualified

because of having made prior entry or for other reason, or was but a tramp, if the books of the Interior Department contained a note of entry made before definite location of the road, or withdrawal at the local land office, it came to be the inflexible ruling of the Interior Department, that the entry thus made excepted the lands from the grant to the company and defeated its right forever, unless the false entry was cancelled before the location of the road. The Department further held that if the false entry was cancelled after the definite location of the road, the lands were then subject to homestead or pre-emption entry at the minimum price, though the even numbered sections within the grant could only be entered at double the minimum; and this absurd result was held to follow because of the false and fictitious entry. The ruling would be just as absurd if the party made the entry in good faith and afterwards abandoned or forfeited it.

That Congress did not intend that the words, "*to which a homestead or pre-emption claim may not have attached*," in section 2 of the act of 1862, should defeat the grant to the railroad company, unless the homestead or pre-emption claim, founded upon the entry was finally perfected, is quite clear. The grant was of public lands—lands entered under the homestead and pre-emption laws remained public lands until the titles were perfected.

Frisbie v. *Whitney*, *9 Wall.*, *187*.
Yosemite Case, *15 Wall.*, *77*.
Shepley v. *Cowan*, *91 U. S.*, *338–9*.
Railroad Co. v. *Baldwin*, *103 U. S.*, *426*.

Hence the necessity of the exception in the act, of lands to which homestead and pre-emption titles had

been initiated. Without the exception the grant would have included valid homestead and pre-emption entries.

To relieve the company from any possibility of loss by reason of a misconstruction of the meaning of the words, "*may not have attached*," in section 3 of the act of 1862, Congress, in section 4 of the act of 1864, was explicit in declaring the exceptions from the grant. The declaration was that the grant "shall not defeat or impair any pre-emption, homestead, swamp-land or other lawful claim. This exception was in favor of the homestead or pre-emption claimants and was intended to define and make certain what was granted. Obviously it was the intention of Congress to grant all the odd sections of the public lands within the prescribed limits, though entries of parcels of them may have been made under the homestead or pre-emption laws, unless the parties making such entries should perfect their titles If such parties voluntarily abandoned their possession and entries, and that fact came to the knowledge of the Department of the Interior, the duty was to correct the books and make the fact appear, and allow the lands to be selected by the railroad company, and upon completion of the railroad, to issue patents to the company for such lands. The Department of the Interior was bound to execute patents for these particular lands to the railroad company unless it would have defeated or impaired Miller's claim. The regular and ordinary course of procedure in the department would have been, upon the demand of the company for certification and patent, to have compared the application with the entries upon the books of the land office, and finding an entry of these lands by Miller, under the homestead laws, to have made inquiry whether Miller had made the requisite proof of settlement, etc., and if the time

had not expired for final proof to have directed notice to him, requiring him to answer whether he made any claim under his entry, and finding the fact to be as shown by the record in this case, that he had abandoned his claim and purchased of the railroad company, the next step would have been to cancel his entry, and certify and patent the lands to the railroad company pursuant to the grant. In this way all confusion, growing out of irregular entries upon the books, would have been avoided, and all the laws would have been observed.

It should be noted that Dunmeyer does not claim title under the homestead entry of Miller. He repudiates all right of claim under his entry, maintains with the railroad company that it was invalid and therefore was cancelled, and that he was defeated in his possession by a subsequent entry by G. B. Dunmeyer under the homestead laws. The decision of this court in Bugbey's case, *96 U. S., 165*, is much in point here. In that case a party was found in possession of the south half of section 16, town 10, range 8, when the survey of public lands in California was made, and was therefore within the exception of the grant to the State, and might have proceeded and perfected his title under the preemption laws. He omitted to make claim under the preemption laws and abandoned his possession In respect to the transaction this court said, on page 167, "the settler, however, was under no obligation to assert his claim, and he having abandoned it, the title of the State became absolute as of May 19, 1866, when the surveys were completed."

It is difficult to perceive why the law laid down by this court in that case is not conclusive in favor of the railroad company in this.

II.

THE DEPARTMENT OF THE INTERIOR WAS PROHIBITED BY ACTS OF CONGRESS FROM PERMITTING THE HOMESTEAD ENTRY BY G. B. DUNMEYER.

Section 7 of the act July 1, 1862, contains the following proviso:

"*Provided*, That within two years after the passage of this act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry and sale, and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted, to be surveyed and set off as fast as may be necessary for the purposes herein named."

By this proviso, upon filing the required map all the lands, even as well as odd numbered sections, must in compliance with the law, have been withdrawn. Although such map was filed by the railroad company, the record does not disclose the fact, but it is to be inferred as the fact, was that the company had not, to July 3, 1866 filed a map designating the route of its road upon the line upon which it was afterwards constructed adjacent to these lands, and that congress, in aid of the company, passed the act of that date, before referred to. That act expressly required the Secretary of the Interior to reserve the land from sale upon the filing of the map required by said act. Now this reservation was not like one made by the Executive in his discretion, to be in force or revoked at his pleasure,

but was by positive law, the execution of which the Executive had not the right to defer, revoke, or disregard. The record shows that the map was filed as required by the act, on July 11, 1866. From that date these lands were excepted from the public domain, and beyond the disposition of the Executive or the Department of the Interior.

March 6, 1866 the following act was passed (*15 Statutes at Large 39.*)

AN ACT RESTORING LANDS TO MARKET ALONG THE LINE OF THE PACIFIC RAILROAD AND BRANCHES.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*. That nothing in the act approved July 1st, eighteen hundred and sixty-two, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes," and the acts amendatory thereof, shall be held to authorize the withdrawal or exclusion from settlement and entry, under the provisions of the pre-emption or homestead laws, the even-numbered sections along the routes of the several roads therein mentioned which have been or may be hereafter located: Provided, that such sections shall be rated at two dollars and fifty cents per acre, and subject only to entry under those laws; and the Secretary of the Interior be, and is hereby, authorized and directed to restore to homestead settlement, pre-emption, or entry, according to existing laws, all the even-numbered sections of land belonging to the government, and now withdrawn from market, on both sides of the Pa-

cific railroad and branches, wherever said road and branches have been definitely located."

If the former act respecting the withdrawal of lands, had been equivocal in respect to the withdrawal of the even-numbered sections, this act makes it certain that Congress held they were withdrawn, and this is the only act which permits any of the lands within the twenty mile limits to be disposed of by the Department of the Interior. The terms as to price are fixed by the act, at double the minimum price; and so the contention of the company is that the Department of the Interior had no right to receive G. B. Dunmeyer's application for homestead entry, that as to the odd sections within the grant the powers reserved to the Department by the acts of Congress, making the grant, were to hear and determine the rights of pre-emption and homestead claimants, as against the claim of the company under the grant, and if found invalid for any reason, to certify the land to the railroad company.

The limitation upon the *grant of the public lands* to the company was that the grant should not defeat or impair a homestead entry. Plainly, if the homestead entry of Miller was not defeated or impaired by the grant, the title to the land in question passed, under the grant, to the railroad company. The action of Miller in purchasing of the railroad company is conclusive upon this point. His purchase and waiver of homestead entry occured Dec. 17, 1869.

The Supreme Court of Kansas, in deciding this cause, made reference to the act of Congress of April 21, 1876, chapter 72, page 35, U. S. Statutes, 1st session Forty-

fourth Congress, for the purpose of showing that the reservation of the lands, in 1866, ten years before, only took effect on the receipt of the letter of the Commissioner of the General Land Office at the local land offices:—but since that act, if it could in any event affect this case, is more comprehensive than the object for which it was cited, it may be prudent to consider what effect, if any, that act had upon the right of the railroad company. The first section of this act declares that homestead entries, within the limits of railroad grants, made before notice of the withdrawal of the lands embraced in the grants was received at the proper local land office, shall be confirmed.

By section two it is provided that re-entries of abandoned homestead claims within the limits of the grant shall be valid.

Manifestly the object of this act was to defeat prior grants of lands to railroad companies. This grant made to the railroad company, plaintiff in error, was in 1862, and precision was given to it by filing the map July 11, 1866. The pretended homestead claim of Miller was made July 25, 1866, was afterwards abandoned by him, the lands sold by the railroad company to him, the purchase price paid the company, and its warranty deed executed to Miller's assignee more than five years before the passage of this act. Indeed, the second homestead entry had been allowed and patent issued upon it, and this suit commenced, some time before the act was passed.

Evidently it was not the opinion of the Kansas Supreme Court that this act of Congress could be invoked to defeat the title of the company, for plainly it was beyond the power of Congress to destroy the grant of this land, if precision had been given the grant by filing

formal order of withdrawal through the routine of the General Land Office. Arguments in that direction could have had but one result, namely, the futility of the claim that the grant by Congress was without effect, if the Secretary of the Interior did not comply with the terms of the act of July 3, 1866. It is enough to say that the act contained no such condition. The grant, in place did not take effect upon the will of the Secretary of the Interior. It took effect upon filing of the map.

J. P. USHER,

Atty. for Plaintiff in Error.

113-629

Office Supreme Court U. S.
FILED
JAN 19 1885
JAMES H. McKENNEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1884.

No. 67.

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PLAINTIFF IN ERROR,

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LEWIS DUNMEYER, DEFENDANT IN ERROR.

Brief of John F. Dillon for Plaintiff in Error.

C. G. Burgoyne's "Quick" Print, 146-150 Centre St., N. Y.

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BRIEF OF JOHN F. DILLON FOR PLAINTIFF IN ERROR.

C. G. BURGOYNE'S "Quick" Print, 146-150 Centre St., N. Y.

In United States Supreme Court

OCTOBER TERM, 1884.

KANSAS PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

AGAINST

LEWIS DUNMEYER,
Defendant in Error.

Statement of Facts.

November 23, 1870. Conveyance of 160 acres in Section 25, T. 13, R. 2, Kansas, by the Railway Co. to the defendant in error, with covenant of warranty.

Deed: Record, p. 2.

November 11, 1875. Lewis Dunmeyer, the covenantee, brought this action against the Railway Company, the covenantor, alleging the paramount title, at the date of the deed, to be in the United States, where it continued until October 16, 1871, "when the plaintiff was ousted and dispossessed of the said premises, contrary to the deed and covenant of the said defendant."

Record, p. 2.

The Supreme Court of Kansas gave judgment for

the plaintiff, and the Railway Company prosecutes this writ of error.

OPINION of the Supreme Court of Kansas.
Record, pp. 19–23.

THE FACTS ARE NOT IN DISPUTE and are shortly these:

1st. The land is an odd numbered section, "about twenty rods from the Kansas Pacific Railroad track" and within the Company's land grant.

Record, p. 12.

2d. July 1, 1862. Land grant to the Kansas Pacific Road (Leav. L. & Pawnee Co.).

12 Stats., 489.

Section 3. Land grant.
Section 7. Map to be filed.
Section 9. Grants to defendant company.

3d. July 2, 1864. Amendatory Act enlarging and changing grant.

13 Stats., 356.

Section 4. Definition of grant of lands.

June 22, 1866. MR. HARLAN, Secretary of the Interior, decided that if a homestead or pre-emption claim is abandoned or forfeited, the railroad grant immediately attaches.*

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*Secretary HARLAN'S *Decision.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, June 22, 1866.

The Commissioner of the General Land Office.

SIR—I have received your letter inclosing instructions which you propose to issue to the register and receiver at Dakotah City, Ne-

4th. July 11th, 1866. Map of general route of road filed in the Department of the Interior.

Record, p. 14.

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braska, in regard to pre-emption and homestead settlers upon odd sections within the limits of the grant for the Burlington and Missouri River Railroad, and also enclosing a letter from Henry Beard, Esq., bearing on the same subject.

The homestead settlers' right attaches only from the date of entry, the pre-emptor's from the date of his actual personal settlement. The title in either case is consummated by a full compliance with the terms and conditions imposed by law.

The grant to said company [see § 19, Act July 2, 1864], does not embrace lands to which a valid right arising either under the homestead or pre-emption law had previously attached, *but if such right be abandoned or forfeited, the grant would immediately thereafter take effect.* A pre-emptor cannot abandon his claim as such, or transmute it to a homestead entry so as to defeat the right of the company, which inured before such entry be made.

If a pre-emption settlement had been commenced upon surveyed land, the latter might be entered as a homestead before the right of the company attached, but not at a subsequent date.

With these modifications of your instructions they are approved, and, with Mr. Beard's letter, returned herewith.

I am sir, very respectfully your obedient servant,

JAMES HARLAN,
Secretary.

THIS RULING was reported to Congress, in 1866, in the amended report of Commissioner General Land Office, p. 19.

See extract in Mr. BEARD'S brief, p. 18.

November 3, 1866, Secretary BROWNING decided the same way:

Secretary BROWNING'S *Decision.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., November 3, 1866.

SIR—I have received and considered the papers accompanying your letter of the 24th ultimo, transmitting the appeal of W. A. Gorman, Esq., attorney for plaintiff, from your decision in the case of Frank Pickler, Homestead Entry No. 2862, St. Peter, Minn., Series.

It appears that Pickler, on the 2d June, 1857, filed a declaratory statement of his intention to enter as a pre-emption the tract in question, (southwest quarter of Sec. 17, Tp. 111, R. 23, Minnesota,) but failed to prove up and pay for the land as required by notice attached to proclamation No. 664, of July 7, 1860. The tract being part of an odd-numbered section within the fifteen mile limits of the Minnesota Valley Railroad, on Pickler's forfeiture thereof, the title thereto vested in the company, as fully and effectually as if his right had never attached. His subsequent homestead entry was accordingly canceled, as the land had been certified to the State for

5th. July 14, 1866. Order of Commissioner of General Land Office withdrawing the lands in odd sections from sale, homestead and pre-emption entry.

Record, p. 14.

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the benefit of the company, and was, therefore, not unappropriated public land.

Whatever might have been my opinion on the subject as an original question, it seems to have been settled by the repeated rulings of your office, which I am not inclined now to disturb.

Your decision is affirmed and the papers are returned.

I am, sir, very respectfully,
Your obedient servant,
O. H. BROWNING,
Secretary.

The Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., October 24, 1866.

HON. O. H. BROWNING,
Secretary of the Interior.

SIR—I have the honor to submit herewith the appeal of W. A. Gorman, Esq., attorney for plaintiff, from the decision of this office in the case of Frank Pickler's Homestead Entry No. 2862, St. Peter's Serlies, said entry having been canceled for conflicting with the claim of the Southern Minnesota, now Minnesota Valley Railroad Company, as shown by our letter to the local officers, a copy of which is herewith enclosed, marked A.

This cancellation is in conformity with a principle which has always governed the action of this office in such cases, &c. * * *

Very respectfully,
JOS. S. WILSON,
Commissioner.

June 25, 1867, Acting Secretary OTTO made the same ruling.

Acting Secretary OTTO'S *Decision.*

EXTRACTS FROM THE DECISION IN LABAN LANGLEY'S CASE.

[June 25, 1867.]

"Two of Langley's witnesses swear that he told them in January and March, 1865, he was going to claim this land (lots 1 and 2 and S. ½ N. W. ¼ of Sec. 35, Tp. 6 S., R. 2 W., Mt. D. M., California,) as a pre-emption.

* * * "Such declarations go for naught, in the absence of those corresponding acts requisite to the establishment of a pre-emption, such as the building of a dwelling house and out buildings,

6th. July 25, 1866. One *Geo. W. Miller*, filed application on the land in question, under the Homestead Act.

Record, p. 9.

[NOTE. This was *after* the survey of the route and after the map of general route had been filed in the Department of the Interior.]

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or the legal appropriation of the same to the settler's own use, with the improvement of the land to such an extent as would show an honest intention to claim the benefits, and avail himself of the privileges of the pre-emption laws.

"Those elements seem to be wanting in this case. The absence of such improvements of his own or their legal appropriation to his own use prior to the intervention of the railroad right, must be fatal to Langley's claim.

"The proviso in the 4th section of said act of July 2, 1864, excepts from the Pacific Railroad grant only lawful claims."

The rejection of the claim of Laban Langley is affirmed.

Very respectfully, your obedient servant,

W. T. OTTO,
Acting Secretary.

HON. JOS. S. WILSON,
Commissioner of the General Land Office.

November 22, 1867, Mr. Secretary BROWNING gave an elaborate opinion to the same effect as Secretary HARLAN's.

Secretary BROWNING'S *Opinion*:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., Nov. 22, 1867.

SIR—I have received your letter of the 13th July last, submitting on appeal the papers in the case of Caswell L. Conner vs. The Central Pacific Railroad Company of California, from the Marysville Office, California, the tract in controversy being the Northeast Quarter, Sec. 15, T. 8 N., R. 5 East.

Conner appeals from your decision of March 12, 1867, rejecting his pre-emption claim.

It appears from the papers that Conner first commenced improvements on the land in 1858; that in January, 1862, he first resided thereon. In April or May of the latter year, Conner moved away and did not return to the land with his family until February, 1864, at which date this township had not been surveyed. On the 22d of April, 1865, the township plat was approved, and on the 8th of May following it was filed in the local office.

A withdrawal of lands was ordered on account of this railroad, August 2, 1862, to take effect from the date of the receipt of the order at the local office; said order was received there September 12,

7th. July 26, 1866. Map of general route received by local land officers, and withdrawal noted on the maps and plats in the local land office.

8th. Sep. 21, 1866. Line of railroad definitely fixed.

9th. 1866–1869. Miller was in possession as a "homesteader."

Record, pp. 8, 10.

1862. The effect of the withdrawal as applicable to *unsurveyed* lands is at issue, and the attorneys of the railroad company argue that the withdrawal took effect, within the specified limits, upon the *unsurveyed* as well as upon the surveyed land, from September 12, 1862.

The third section of the act entitled, "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean," &c., approved July 1, 1862 (12 Stat. 492), grants: "Every alternate section of public land, designated by odd numbers, to the amount of *five alternate sections per mile* on each side of said railroad, on the line thereof, and within the *limits of ten miles* on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed," with a proviso excepting all mineral lands.

The seventh section of this act provides "that within *two* years after the passage of this act, said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within *fifteen* miles of said designated route or routes to be withdrawn from pre-emption, private entry and sale; and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purpose herein named."

The foregoing provisions leave not the least doubt that Congress understood the grant to be *unsurveyed* as well as surveyed lands traversed by the route of the road. There is as little doubt that all the lands, both of the even and odd numbered sections of surveyed lands, and all unsurveyed lands for 15 miles on each side of the route, being five miles more on each side of the road than the extent of the grant, were, by the order to the local land officers before mentioned, absolutely withdrawn from pre-emption, private entry and sale.

At the time of the passage of this act, the unsurveyed lands which are now the subject of discussion, were open to pre-emption settlements, but by the terms of this act they were, to the extent mentioned in said act, to be withdrawn from further liability to such appropriation. No distinction is made in the grant between surveyed and unsurveyed lands. Neither of them are thereafter subject to settlement under the pre-emption laws.

The fourth section of the amendatory act of July 2, 1864 (13 Stat., 358), enlarges the grant, and then provides that "any lands

10th. Decr. 17, 1869. Said Miller contracted in writing with the Railway Company to buy this land of it for $200 cash, *and accepted possession under the company.*

Contract: Record, p. 5.

11th. Jany. 18, 1870. Miller assigned the contract to Geis.

Record, p. 5.

" granted by this act, or the act to which this is an amendment, " shall not defeat or impair any pre-emption, homestead, swamp " land or other lawful claim, nor include any government reserva- " tion or mineral lands, or the improvements of any *bona fide* set- " tler," &c.

This evidently has reference only to such pre-emption and homestead rights and other lawful claims as may exist, when the right of the road attaches, and not to such as may arise afterwards. *The object of the provision was to prevent the road from displacing the pre-acquired rights of others, and not to enable others to displace the pre-acquired rights of the road.*

The public domain is at the absolute disposal of Congress, and that body can grant away the unsurveyed as well as the surveyed lands. The intention to do so in the case of the Pacific Railroads is clear beyond doubt, and we must execute the law as we find it.

There is no more reason to suppose it to have been the intention to continue to the public the right to settle under the pre-emption laws on unsurveyed than surveyed lands. In neither case can it be done after the road has filed a map of its route, and notice has been given to the local officers to withdraw or withhold the lands.

Any other construction might go far towards defeating the objects of the grant, and would deny any effect whatever to the provisions of the Pacific Railroad laws, which direct the unsurveyed lands to be withdrawn.

This gives full effect to all parts of those laws without at all interfering with the proper operation of the pre-emption laws. They all have a proper subject matter to act upon, and under this construction can be executed in entire harmony with each other.

Your decision is affirmed. The papers are herewith returned.

Very respectfully, your obedient servant,

O. H. BROWNING,
Secretary.

HON. JOS. S. WILSON,
Commissioner of the General Land Office.

This construction remained until April 28, 1871, when Secretary DELANO changed it in a case under Sec. 19, Act, July 2, 1864 (see Mr. BEARD's Brief, pp. 5–7, 18–22); and in 1878 Mr. Secretary SCHURZ overruled the doctrine of 1871, and under Secretary TELLER's decision (see Mr. BEARD's Brief, p. 7) the question is again oscillating.

12th. Nov. 5, 1870. Geis assigned contract to Lewis Dunmeyer (the defendant in error).

Record, p. 5.

[In fact, Lewis Dunmeyer was a co-purchaser with Geis, and Geis afterward sold his half to G. B. Dunmeyer.

Geis' Ev., p. 8.
L. Dunmeyer's Ev., p, 12.
G. B. Dunmeyer's Ev., p. 13.]

13th. Nov. 12, 1870. Deed from Railway Company to the plaintiff.

Record, p. 2.

14th. After which and under which deed the grantee, through his son, G. B. Dunmeyer, entered and took possession, and Miller abandoned and left the land.

Record, p. 12.

15th. The $200 in money, which was paid in Miller's name to the company for the land was furnished, one-half by Geis and one-half by the defendant in error.

Record, pp. 8, 12.

16th. April 28, 1871. Miller's homestead entry canceled by Commissioner, General Land Office.

Record, p. 9.

Oct. 16, 1871. G. B. Dunmeyer, being still in possession (Record, p. 12), filed homestead entry on the land and entered it with scrip (p. 10), and on

17th. March 25, 1875. G. B. Dunmeyer received a patent for the land from the United States.

Record, p. 6.

18th. Nov. 11th, 1875. This suit brought by Lewis Dunmeyer.

19th. THE POSSESSION *originally obtained under and from the Railway Company has never been disputed or disturbed by any one, and there has been no ouster or dispossession of the plaintiff or his son, and if any right of action on the covenant of warranty exists, such right is in one Crowell and G. B. Dunmeyer.*

Record, pp. 8, 12, 13.

ARGUMENT.

I.

At the date of the deed, November 23, 1870, the title to the land in question was in the Railway Company, and, if so, there was, of course, no breach of the warranty, and judgment should have been given for the company.

The land grant to the Pacific Companies is in many respects *sui generis.*

The history of the Pacific Railway legislation, the purpose of Congress in that legislation and the inducements which it proposed to capital to influence it to undertake the needed National work are set forth in many judgments of this Court, and particularly in the United States vs. Union Pacific R. R. Co., 91 U. S., 72, in the light of which every part of the legislation relating to these companies is to be construed.

BY SECTION 2, Act 1862, The United States agreed to extinguish the Indian titles for the benefit of the

companies, in order to make their grants as full as possible.

SEC. 3 made a grant, in the usual form, of "every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad on the line thereof, and within ten miles thereof, not sold, * * * and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed," &c.

There are no indemnity lands provided for in the grant, and this for the reason that it was supposed that as the country was unsettled and many of the lands not even surveyed, the grant would be practically full.

SEC. 7. Provided for filing map of general route of the road and the withdrawal of the lands within fifteen miles, "from pre-emption, private entry and sale."

The Act of July 2, 1864, enlarged the grant and more specifically defined it.

See Section 4, every part of which is material. It is a complete revision of the subject on this point; and the Acts of 1862 and 1864 are to be construed as if the language of section 4 had been found in the Act of 1862.

M. K. & T. Ry. Co. vs. K. P. Ry. Co., 97 U. S., 491, per FIELD, J., whose language is quoted in Judge USHER'S brief, p. 6.

The purposes of the legislation must be regarded. The first purpose is to give the company within the prescribed lateral limits every odd section; but, by the Act of 1862, section 3, rights were reserved in respect of lands "to which a pre-emption or homestead claim may have attached at the time the line of road is definitely

fixed." The purpose of the reservation was not to limit the amount of the granted lands for the sole use and benefit of the United States or provide for a reversionary right in the United States, to enable it to sell or dispose of the same lands to others, but solely to protect the pre-emption and homestead claimant. If the language of section 3 had not been changed, it is submitted that the true construction thereof would be (especially in view of the fact that there was no grant of indemnity lands), that if the pre-emption or homestead claimant voluntarily abandoned the claim, the land would be within the grant.

Reasonable doubt on the subject is removed by the specific language of Sec. 4 of the Act of 1864. It says, in effect, that the company shall have all the odd sections within the granted limits, except where this will "defeat or impair any pre-emption, homestead or other *lawful* claim," &c., * * * "or the improvements of any *bona fide* settler," &c.

As respects lands on which there was an inchoate valid right of pre-emption or homestead at the time the route is definitely fixed, the estate granted to the company is, under section 4 of the Act 1864, a *determinable fee, either upon condition, or limitation*, (it is immaterial which); the estate thus granted to the company to determine on the contingency or event that such inchoate right shall be perfected, and thereupon revert to the United States in trust to enable it to convey the fee to the pre-emption or homestead claimant, who in the meantime is entitled to the possession to perfect his right.

1 Washb. Real Prop. (4th Ed.) *62, pl. 78, 79, 80, 83, 84; 2 *Ib.* *457, pl. 26, 27; 2 *Ib.* *288, 289.

I REPEAT, THE PURPOSE IS PLAIN; VIZ, *not to limit the amount of the grant for the benefit of the grantor, but to protect the lawful claim of any pre-emption or homestead occupant.*

The meaning of Congress may be expressed thus: "We grant the railway company every odd section; but this grant shall not defeat or impair any lawful pre-emption or homestead claim existing when the line of the railroad is definitely fixed."

The purpose was to give the company the odd sections, as against the United States and all the world, except where this would defeat or impair the rights of the pre-emption or homestead claimant. Such preferential right is not defeated where such a claimant chooses to abandon his claim.

I have not been able to distinguish *Bugbey's case*, 96 U. S., 165, from the one at bar. When the surveys in California were completed, May 19, 1866, Bugbey was an actual settler on Sec. 16. As against him this Court held that the State took no title if "he perfected his claim by a patent from the United States, and in such a case the State must look for indemnity, to the provisions of section 7. As against all the world except the pre-emption settler the title of the United States passed to the State upon the completion of the surveys." April 22, 1867, Bugbey bought the lands of the lands of the State and took a patent, under which he claimed title. The adverse claimant was the Water & Mining Co., which claimed title under the Act of July 26, 1866, and it had such title if the lands were the lands of the United States. This Court held that the title of the State became perfect as of May 19, 1866, in consequence of Bugbey's abandonment of his pre-emp-

tion right and purchase from the State, April 22, 1867, when the surveys were completed.

It is certain that the company's right to the land in question was clear unless there was a "lawful homesteal claim upon it at the time its route was definitely fixed. The plaintiff below recognized the company's right by accepting a deed and entering upon the possession of the land under it. In this action, the burden of proof is upon him to show that the company had no title, by reason of an existing lawful homestead right in Miller at the date when the company's route was definitely fixed. No evidence whatever was produced to show that Miller was entitled to make a homestead claim or that he complied with the requisites of the Homestead Act. This alone necessitates a reversal of the judgment.

If such an occupant voluntarily abandons his inchoate claim, as he has a right to do, why should the Government gain the land and the company lose it without any provision for indemnity?

In all the usual land grants indemnity is provided for land lost in this manner, but not so in the case of the Paciffc companies; and the view we are combatting places these companies, supposed to have been more than ordinarily favored, in a worse plight than ordinary land grant companies.

The construction for which the company contends was, for more than seven years, held by the Interior Department to be the sound one. The company and the public acted upon it. Innumerable titles have

been acquired upon the faith of the decisions of the Department and the action of the company under those decisions; which titles will be overthrown by a judicial judgment that such decisions are wrong. *Cui bono?*

Why should the *bona fide* purchasers from the company who, in most cases, are actual settlers who have for years been in possession of their lands, have the same entered from under them by adventurers? *

EVERY CONSIDERATION OF JUSTICE AND POLICY requires the Court to adopt the *practical interpretation* which has been placed upon the legislation by the Department, the Company and the Public.

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* *Telegram to* B. MCALLISTER.

NEW YORK, January 12, 1885.

B. MCALLISTER, ESQ.,
Land Commissioner Kansas Pacific Road,
Kansas City, Missouri.:

Wire me, as near as you can, number of acres in Kansas Pacific land grant affected by the question whether the company's grant attaches to invalid and abandoned homestead and pre-emption entries; and how many acres the company has sold on the faith of Harlan's and Brownings's decisions prior to 1871. Want to use it in Dunmeyer's case in the Supreme Court.

JOHN F. DILLON.

Answer to Foregoing.

KANSAS CITY, MO., Jany. 13, 1885.

JOHN F. DILLON, N. Y:

About thirty thousand acres, one-third of which are unsold.

B. MCALLISTER.

KANSAS CITY, MO., 15th January, 1884.

JNO. F. DILLON, N. Y.:

Referring to yours twelfth inst. and our telegram, we add a large share of said lands have been patented to the company under former rulings of the department.

B. MCALLISTER.

MILLER ABANDONED, of course, his right to acquire a title to this land under the homestead laws, by his purchase thereof from the company in 1869, and his sale of the land thus purchased from the company to the plaintiff.

Bugbey's Case, 96 U. S., 165.

This abandonment was the voluntary act of Miller. He chose not to perfect his homestead claim. His abandonment was recognized by the Government by the cancellation, in 1871, of his entry.

II.

The paramount title alleged by the plaintiff to constitute a breach of the warranty is the homestead entry of his son, G. B. Dunmeyer, in 1871. This entry was void, not only because the company acquired the title to the land under its grant from the United States, as maintained in Proposition I., but if not, the land in question remained, in 1871, still withdrawn from "pre-emption private entry and sale," and the homestead entry, October 16th, 1871, by G. B. Dunmeyer, was for that reason illegal and void.

It is maintained by the company that the land in question was thus withdrawn on July 3d, 1866, by force of the Act of Congress of that date (14 Stats., 79), and

that this withdrawal became complete as early as July 11th, 1866, when the map of the route of the road was filed in the Department of the Interior.

See on this point Judge USHER'S BRIEF, III., p. 14 *et seq.* : I will not elaborate the point further.

See Van Wyck vs. Knevals, 106 U. S., 360, 366.

If this is so, it is an end of the plaintiff's case.

But if the Court shall adjudge that the withdrawal did not become complete until July 26th, 1866, when the local land officers were notified, it became complete at that date; and the odd sections in the grant had not been "restored to homestead settlement, pre-emption or entry," in 1871, when G. B. Dunmeyer attempted to enter the land under the homestead law.

That such was the understanding of Congress, appears from the Act of March 6th, 1868 (15 Stats., 39), which is a *special act* in respect of the lands along the Pacific roads and branches.

See text of this act, Judge USHER'S BRIEF, p. 11.

This act, as it did not restore *odd* sections within the grant to market, contained no provisions for the disposal thereof. This is important in two respects:

1. As the odd sections remained withdrawn, they were not subject to pre-emption and homestead settlement.

2. The act is by implication a legislative recognition of the then existing rulings, regulations and practical construction, which had been given to the grant by the Interior Department, viz., that

on a forfeiture or abandonment of a pre-emption or homestead claim, the land was within the grant to the company.

If this had not been the understanding and purpose of Congress, can any reason be given why the forfeited and abandoned *odd* sections within the grant should not have been restored equally with the *even* sections?

III.

There was no breach of the covenant of warranty. The possession received from the Railway Company by the covenantee has never been disturbed. The plaintiff had no right to sue on the covenant.

Miller, in the contract of purchase from the Railway Company, admitted that his possession was to be under that contract.

Record, p. 5.

Miller assigned the contract to Geis (Record, p. 5). Lewis Dunmeyer was in fact a co-purchaser with Geis, and Geis afterwards sold his half to G. B. Dunmeyer.

Record, pp. 8, 12, 13.

G. B. Dunmeyer, after the company's deed to his father, went into the possession of the land *under the deed* with his father's consent. While so in possession G. B. Dunmeyer attempted to repudiate the title under which he entered, and made while in possession the homestead entry of October 16, 1871. And at the date

of bringing this suit he had sold 80 acres to his father (Lewis), and the other 80 acres was owned by one Crowell.

Record, p. 12.

THE ONLY COVENANT in the deed was one of WARRANTY.

No paramount title to that which the Railway Company conveyed was ever asserted by any one against either of the Dunmeyers; nor did the covenantee ever yield the possession to the owner of the paramount title.

It is elementary law that

"The mere existence of a superior title in another, which has never been enforced, cannot amount to a breach of this covenant (warranty); he must be disturbed, he must be evicted, but he need not be evicted by legal process; it is enough that he has yielded possession to the rightful owner, or, that the possession being vacant, the rightful owner has taken possession."

3 Wash. Real Property (4th Ed. * 666, top p. 478, pl. 28, and cases cited.

Also that the grantee in possession when the covenant is broken must be the plaintiff to enforce it. *Ib.* * 662, top p. 470, pl. 20.

JOHN F. DILLON,
For the Railway Company.

113629

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 67.

THE KANSAS PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

LEWIS DUNMEYER.

HENRY BEARD,
Att'y for Cent. Pac. R. R. Co.

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No. 67.

THE KANSAS PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

LEWIS DUNMEYER.

In Error to the Supreme Court of the State of Kansas.

The undersigned, attorney for the Central Pacific Railroad Company, respectfully states to the Court that said company is largely interested in a question arising in this cause, on which its determination may turn, and, with the concurrence of counsel for the plaintiff in error, he respectfully requests the Court to receive and consider the following printed argument on said question.

If the proposition that the filing of the map of general route July 11, 1866, withdrew the land from homestead entry is sustained, Miller's entry, dated July 25, 1866, was allowed in violation of the law, and could not operate to defeat the grant.

But if that proposition is not sustained, we come to the further question:

DID THE GRANT TAKE EFFECT *upon the abandonment of Miller's entry?*

The entry of Miller, made July 25, 1866, was abandoned when he purchased the land of the R. R. Co., December 17, 1869. (Record, p. 5.) A note in writing was made in the books of the land office, of cancellation thereof, by letter dated 28th April, 1871. (Record, p. 9.)

The railroad opposite the tract (E. ½ S.W. and W. ½ S. E. ¼ of sec. 25 13 S. 2 W., Salina district, Kansas) was *definitely* located September 21, 1866. (Record, p. 14.)

That said road was fully completed and accepted by the President of the United States soon afterwards, are facts that are notorious and have been presented to this Court in the records of other cases.

The grant took effect upon the tract on the 21st September, 1866, unless it was excepted from the effect of the grant by the limiting clauses therein. Was it so excepted?

THE CLAUSES IN THE STATUTE REQUIRING CONSTRUCTION.

The grant (Act July 1, 1862, sec. 3) is of "every alternate section of public land designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of the road is definitely fixed." (12 Stat., 489.)

Section 4 of the amendatory act of July 2, 1864 (13 Stat., 356), amends the original act by changing the word five to *ten*, and the word ten to *twenty*, and declares that the term

"'mineral lands,' wherever the same occurs in this act and the act to which this is an amendment, shall not be construed to include coal and iron lands. And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other *lawful* claim, nor include any Government reservation or mineral lands, or the improvements of any *bona fide* settler on any lands returned or denominated mineral lands, &c."

The most natural interpretation of these clauses is, that Congress intended that the grant should not interfere with lawful claims having legal inception before the grant attached—that such claims might afterwards be perfected, notwithstanding the grant; but if they expired and were never perfected there would then be no obstacle to the taking effect of the grant; that the United States after by law providing that there "be, and is hereby granted" certain defined tracts of land on conditions, had not any reversionary interest in any such defined tracts, or any legal right or intention to recoup any of them and sell them to third parties long after the companies had fulfilled the conditions of the grant.

Regarding section three of the act of 1862 and section four of the act of 1864 as one grant—the latter, however, being an amendment enlarging and explaining the former—the obscurities and ambiguities of the prior are removed by the words of the later enactment.

For instance: Viewing alone the words of the act of 1862, "every alternate section of public land designated by odd numbers," * * * "not sold, reserved, or otherwise disposed of by the United States," do we regard these as equivalent to not sold by the United States, not reserved by the United States, or otherwise disposed of by the United States; or do the words 'by the United States' explain and qualify only the words "otherwise disposed of?"

Either interpretation is reasonable, and both lie fairly upon the surface of the clause. The amendatory act settles the doubt. It is the last expression of the legislative will, and says the grant "by this act, or the act to which this is an amendment, shall not include any Government reservation." So that the word "reserved" in the act of 1862 as quoted above, is qualified, and means reserved by the United States as though those words were thus found collocated in the first law.

Moreover, by the second law of amendment there is no

where found any intention to restrict the effect of the former, but everywhere an intention to enlarge; and especially as to the land grant there is specific enlargement as to the quantity of the grant, and in the declaration that lands containing iron and coal shall not be excluded because of the general exclusion of the mineral lands by the first act.

So the words in section 3, "to which a pre-emption or homestead claim may not have attached," are construed and made plain by the declaration in the amendatory law, that the grants shall not be construed to, and shall not defeat or impair any pre-emption homestead, swamp land, or other lawful claim. The form of the provision here is quite similar to that regarding the coal and iron lands. It was intended to make clear the terms of the first act. Congress says the term mineral lands in the administration of the grants is not intended to include coal and iron lands; and in the same temper, spirit, and paragraph Congress says the limitations in the first act, as to pre-emption and homestead claims, will exclude from the grant only those claims having inception before the grant took effect and which are afterwards completed; that is, the grant is not to affect existing adverse interests, but has divested all right of the United States in the granted premises.

CONTEMPORANEOUS CONSTRUCTIONS.

Conformably to this view, soon after the Central Pacific, the Kansas Pacific, and the Union Pacific roads had been commenced, and only one or two sections of each completed, Secretary Harlan, June 22, 1866, ruled that where the inceptive "pre-emption or homestead right has been abandoned or perfected the grant would immediately thereafter take effect."

This view was soon afterwards embodied in a circular of the General Land Office of August 25, 1866, to registers and receivers.

2d Lester's Land Laws, p. 261.

The substance of this circular was published in the annual report of the Commissioner of the General Land Office for 1866, (p. 19,) and the public was notified of the ruling of the Department, that "where pre-emption or homestead rights had been abandoned or forfeited the grant by the railroad law would immediately take effect." [Exhibit "A."]

Subsequently, under date of the 22d November, 1867, Hon. O. H. Browning, a lawyer of national reputation, and personally known to this Court as deserving of the reputation he obtained, more expressly in the controverted case of Caswell L. Connor *vs.* The Central Pacific Railroad Company, construed the 4th section of the act of 1864 as I have above claimed it should be construed. He said:

> The fourth section of the amendatory act of July 2, 1864, (13 Stat., 358,) enlarges the grant, and then provides that any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any Government reservation or mineral lands, or the improvements of any *bona fide* settler," &c.
>
> This evidently has reference only to such pre-emption and homestead rights and other lawful claims as may exist when the right of the road attaches, and not to such as may arise afterwards. The object of the provision was to prevent the road from displacing the pre-acquired rights of others, and not to enable others to displace the pre-acquired rights of the road.

This construction of the law prevailed during all the administrations of Secretaries Browning and Cox, and until changed by Secretary Delano, on the 28th April, 1871, in the decision of a case arising under section 19, of the act of 2d July, 1864. The case was distinguishable from that decided by Secretary Browning, because not involving the 4th section of the same law.

SUBSEQUENT CONFLICTING INTERPRETATIONS.

Mr. Delano approved an opinion of Asst. Att'y Gen'l

Walter H. Smith, Copp's Land Laws, 1st Edition, No. 409, p. 392, in which it was held as follows:

"If the homestead claim has attached at the time the line of the road is definitely located, then the railroad is excluded. It would seem to be immaterial what became of the claim after that, whether it was perfected or abandoned."

Subsequently, Nov. 7th, 1871, the General Land Office issued a circular to registers and receivers, making this decision generally applicable to railroad grants, and inviting applications thereafter at the local land offices for the sale by the United States of the odd-numbered tracts within railroad limits, to which there were homestead claims existing at the date of the definite location of the roads, but which had thereafter been abandoned. (Same vol., p. 405.)

Secretary Delano made no reference to the rulings of his predecessors, when he changed them in 1871, and his decision with some modifications, not necessary to consider, was applied in controversies, and in selecting and patenting railroad lands, June, 1871 to 1878.

Secretary Schurz, in the case of T. H. Gates *vs.* The Cal'a and Oregon R. R. Co., referring to and applying the decision of this court in the cases, Sherman *vs.* Buick, 93 U. S. Rep., 309, and Water & Mining Co. *vs.* Bugbey, 96 U. S., 165, deliberately overruled the doctrine of 1871, and re-established that of 1866, that where homestead or pre-emption claims, existing at the date of definite location were abandoned, the right of the railroad companies attached. (5 Copps' L. O., Jan. 1879, p. 150.)

[Copy annexed, Exhibit "B."]

This doctrine was carried into the general circular of the Land Office in regard to railroad selections, issued Nov. 7th 1879, and approved by Secretary Schurz. This circular has never been revoked, and appears to be in force at the local offices, though not followed in the General Land Office now. I quote as follows:

"Where application is made by a railroad company to select lands on which pre-emption filings have heretofore been made and canceled, or where the same have expired by limitation of law, no other claim or entry appearing of record, you will admit the selections, in accordance with the rules governing in the premises, herein communicated. No proofs by the companies concerning such claims will hereafter be required." (Report of Com. for 1879, p. 127, § II.)

With some modifications, this ruling was applied in the Department of the Interior until Dec. 12th, 1882, when Secretary Teller, in the case of Perkins *vs.* The Cent. Pac. Co., Copp's Land Owner for Jan., 1883, (being vol. 9,) p. 201, deliberately changed it, on the authority of the decision of this court, in Mining Co. *vs.* Consolidated Mining Company, 102 U. S. Rep., 167.

The Department of the Interior, in its last cited action, has not understood the case in 102 U. S. Rep'ts, 167, as I understand it. By reference to page 170 the sections of the act of March 3d, 1853, relating to lands in California, are found, which were under construction in this court. They are entirely different from the provisions of the laws to be construed in this case.

The court, on page 171, alluded to reservations in railroad grants, in which provision is made for indemnity for tracts which "have been pre-empted, sold, or otherwise disposed of." The reference is only to cases in which final rights have inured to opposing claimants prior to definite location, and in concluding the decision the court find that the "facts found by the circuit court bring the case within the provisions of the 7th section of the act of 1853." But this court approved the principle of the case of Water Co. *vs.* Bugby, "that where a settler abandons his claim to hold the land against the State by virtue of such settlement and improvements, and acknowledges the title of the State by purchase, that his improvement or settlement cannot be set up by a third party to defeat the title of the State, recognized by the United States."

This principle would apply in the case at bar if the existing rulings of the Department upon the U. P. R. R. land grant on the 1st September, 1866, when the grant attached, be accepted as a recognition by the United States of the right of the company to this land.

But as this court took pains to say in the case in 102 U. S., Rep., it did not decide therein whether or not "the improvements on the land and the character of the person owning them (on a 16th or 36th section) shall be in all respects those which are prescribed by the general pre-emption law."

It is evident that the decision of this court is intended to be strictly confined to the case and the statutes before it. And so with the cases previously decided.

Sherman *vs.* Buick, and Water & Mining Co. *vs.* Bugbey, 93 U. S., 209, and 96 U. S., 165.

Now, it is plain that under the circular of 1866, Aug. 26, 2d Lesters L. L., p. 261, prescribed just previous to the definite location of the railroad—Sept. 21, 1866, and thatof Nov. 7th 1879, never revoked—the land in contest in this case would inure to the railroad company under its grant.

There has been no decision of this court sustaining the views of Secretaries Delano and Teller. The only reported case from the U. S. circuit courts is that in 2d Dillon's Rep., p. 310, in which the jury was instructed that if the H. S. applicant, Peter Hugus, "never did anything except to file an application for an entry, and afterwards relinquished all right to the plaintiff, then we instruct you, as a matter of law, that *no homestead claim* attached to the land in favor of Hugus, and that the land would be embraced in the grant to the plaintiff made by said act of July 5, 1862," &c. (U. P. R. R. Co. *vs.* Watts, Dillon's C. C. Rep., 2d vol., p. 310.

This case is like the case at bar in its legal aspect, and sustains the interpretation I now claim for the granting clauses of the Pacific R. R. acts.

DID THE PRELIMINARY HOMESTEAD ENTRY DESTROY THE CHARACTER OF THE LAND AS PUBLIC LAND?

I proceed to discuss the adverse suggestion that the homestead entry so withdrew the land from its public status, that no grant of public lands will be construed to embrace it. This proposition is supposed to follow from the opinion given by this court in the familiar case of Wilcox *vs.* Jackson, 13 Peters, 498.

Jackson, claiming under an entry made at the Chicago Land Office in 1835, sued Wilcox, an officer of the U. S. Army, in possession as commandant of U. S. troops. The court found that the land had been reserved for the use of the U. S., under a special order of the President, made in the year 1824—more than ten years before—so that, in the opinion of the court, the laws for the sale of the public lands did not apply to it.

History discloses the fact that the land then involved in suit was afterwards subdivided by the Secretary of War and sold at public sale under laws relating to the sale of military reservations.

There is no similarity between the case of a homestead entry of public land and a reservation of public land for the use of the War Department of the Government, by order of the President of the United States. The latter is the case of a "Government reservation," such as is specially noticed in the limitation of the act of 1864, above noticed. The homestead claim cannot be properly enlarged into a Government reservation. If so, then the United States should sell the land under laws for the sale of military or other such reservations, and not resell under the homestead law.

The reversal of Secretary Schurz's ruling in the Gates' case seems chiefly to have been planted upon this Wilcox & Jackson case; but it must be noticed that the Department has never revoked the circular of Sec'y, Schurz, as though

the last opinion would not be fully applied until this court has had an opportunity to construe the law.

The case of L. L. & G. R. R. Co., 92 U. S., 733, has no application to the present question, because the land there in controversy was included in an Indian title or reservation of a special nature, fixed by treaty; nor has Newhall *vs.* Sanger, 92 U. S., 761, any bearing, because of the statutes specially applying to Mexican claims pending their determination in the courts.

THE NATURE OF THE INCEPTIVE HOMESTEAD RIGHT.

The words, "There be, and is hereby, granted * * * every alternate section of public land, designated by odd numbers, * * * within the limits of ten miles on each side of said road, * * * to which a pre-emption or homestead claim may not have attached, make a grant of public land, but as to lands not finally sold, the pre-emption and homestead rights attach also to the same character of lands, and no other, viz., the public land, by inception of the claim. The right of the claimant is the right to go on from step to step in complying with the pre-emption and homestead law, and to make his proof and obtain his title. This right is to remain unimpaired by the railroad grant, but the case at bar is one in which the homestead claimant is not obstructed, but he declines to pursue his right to completion or make his proof. He abandons his homestead and buys title under the railroad grant, and he does this in conformity with the executive rulings in vogue at the time of his abandonment.

The homestead law in 1866 and 1869 and 1871 was substantially the same as now. (Rev. Stat., Par. 2289, *et seq.*) The right is given in unappropriated public land only. (§ 2289.) The applicant is required to file an affidavit showing his personal qualifications, and that his application is made for his own exclusive use and benefit, and for the pur-

pose of actual settlement and cultivation (2290), and to pay the prescribed fee. No certificate of purchase issues until after five years, and after proof of compliance with the law as to qualification, &c., &c.; the oath of allegiance must also be taken. (2291.) The beneficiary must be a citizen of the United States when he obtains the final certificate. (2291.)

The lands acquired under the law are protected against executions upon debts contracted prior to issuing the patent. (2296.)

The claimant, pending the five years of settlement and cultivation required, may purchase the lands on making proof of a pre-emption thereto. (2301.) But if he takes a homestead, he must, at final completion, swear that he has not alienated any part of his land. (2291.)

Under such provisions of law it is clear that the right of a homestead claimant to a title for the land is not complete, or vested in him, until after he has furnished proper evidence of having fully complied with the requirements of the law.

The law makes no provision for delivering to the party of any evidence of his claim until the final certificate issues. Before that the applications are merely noted on the books of the local office and reported to the Commissioner at Washington. (2295.) After he has made the proof of qualifications and compliance, the patent certificate issues. (Par. 2291.)

Pending compliance with the law and due proof thereof, the rights of the homestead claimant are only of a statutory nature. The title to the land has not inured to or vested in the claimant. Until full compliance he has no right that he can enforce against the United States. This proposition is sustained by the decisions of this court, made in cases arising under the Oregon donation law.

Hall *vs.* Russell, and Vance *vs.* Burbank, 101 U. S., pp. 503 and 514.

In view of the above cited provisions of the homestead law and these decisions of this court, it is preposterous to say that the filing of a preliminary homestead claim upon a tract of land takes the tract out of the category of the public lands, or excludes the land, if the homestead be abandoned, from the effect of a grant or withdrawal.

The clause of the R. R. act of 1862, in the terms of exception, describes such tracts as "public lands" to which an inceptive right has attached under the pre-emption or homestead laws. These rights the grant is not to displace or impair, but these claimants have no power to so tie up the Government title as to reserve the lands against the R. R. grant in favor of third persons thereafter claiming them.

If any such power was bestowed, then a few individuals, by filing fraudulently claims on tracts about to fall in railroad limits, in the names of fictitious or dead persons, might destroy the virtue of the railroad grant to an indefinite extent. The hired laborers engaged in building the roads could do a hundred fold more damage to the companies by filing claims to lands in the district land offices that they never expected to complete, than all their services in the work of construction were worth.

It is not the intention of the law that *bona fide* claims, afterwards abandoned or expired, should withdraw the land from the power of a congressional grant. The land so filed for is not "sold, reserved, or otherwise disposed of by the United States," for those classes are named expressly for exception; but it is merely public land to which an inceptive right to a future purchase has been initiated, and this class is also specially named, and if abandoned and never perfected the abandonment relates back to the inception, and wipes out the claim as though it had never been. There is no certificate outstanding, and it matters not when the land officers add to the notes on their books the fact that the claim has been abandoned or has expired.

It is important to notice that in case inceptive claims are

followed up to completion by compliance and proof, there are provisions of law for the proper sale and patenting of the claims; but there are nowhere to be found any provisions of law for the sale of the same premises by the United States upon claims initiated *after* the definite location of the roads. Such claims are not protected.

Van Wyck *vs.* Kererals, 106 U. S., 360.

THE ACT OF 6TH MARCH, 1868, (15 STAT., P. 39,) CONSIDERED.

Whilst, by the acts of 1862 and 1864, the grant was only of *odd sections*, the withdrawals of land provided for by section 7 (act 1862) were to be of *all the lands* within the prescribed limits, even numbered as well as odd-numbered sections, and on that basis the true interpretation of the grant would sanction the completion of claims initiated in even sections also, but not sanction the sale of even sections to third parties where homesteads had been abandoned. They would remain withdrawn. But by the act of 1868 (15 Stat., p. 39) Congress directed the restoration of the even sections from the withdrawals, *but* did not provide for the subsequent disposal of ODD sections within the grant. And why? Plainly because Congress recognized the existing interpretation of the grants as given by Secretaries Harlan and Browning, and as communicated to Congress and as expressed in regulations, that if a pre-emption or homestead right shall be forfeited or abandoned (in land within the terms of the grant) "the grant would immediately thereafter take effect."

In the brief of Judge Usher (p. 11) this law is incorrectly dated March 6, 1866. The true date is March 6, 1868; and very great importance attaches to it, because it was passed on review of all the then existing complications, and to make the administration of the land grants conform to the interests of homestead and pre-emption claimants, who thereafter might initiate or file their claims, and after the interpretation herein contended for had been announced to

the public, with the approbation of the Secretary of the Interior, in the annual report of the General Land Office for 1866.

When the even sections were restored to market under the act of March 6, 1868, the registers of the district land offices were instructed to give notice, by publication in two newspapers, having the largest circulation in their districts, for thirty days, that on a certain day they would be prepared to receive applications for the lands under this act.

The interpretation now claimed as the true one, we thus show, was established in 1866 by Secretary Harlan, sustained expressly, in 1867, by Secretary Browning, and was followed by the act of Congress in harmony therewith, of March 6, 1868.

It is believed that the present is the first case in this court involving the precise question whether or not the land, within the terms of the Union Pacific land grant, covered by a homestead claim, initiated prior to the location of the road, falls, upon the abandonment of the claim, to the grant or to the Government.

It is important to observe that the land grant under discussion is one of tracts in place and within limits. There is no indemnity for tracts within the limits that have previously been sold or disposed of by the United States.

It is true also that these laws do not contain the general exception found in the State grants, which was construed in the Des Moines cases, as excepting the river lands from the railroad grants of 1856 to the State of Iowa.

THE DIGNITY AND AUTHORITY OF THE CONTEMPORANEOUS CONSTRUCTION

of the statute are respectfully claimed here, as deciding that such lands inure to the railroad companies under the Union Pacific grants.

There has not been in this country perhaps a more thor-

oughly considered case upon this question than that wherein the Court of Appeals in Massachusetts rendered its unanimous opinion to the State Legislature.

3d Pickering's Rep., 518.

See also Rogers *vs.* Goodwin, 2nd Mass., 477.

Packard *vs.* Richardson, 17 Mass., 144.

Other State courts have maintained the same view. I will only further refer, however, to decisions of this court which has steadily maintained the same doctrine:

"It is not unimportant to state that the construction which we have given to the terms of the act is that which is understood to have been *practically acted upon by the Government as well as individuals* ever since its enactment.

United States *vs.* State Bank of North Carolina, 6 Peters, pp. 39 and 40.

See also Stuart *vs.* Laird, 1 Cranch, 299.

"In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to great respect."

Edwards' Lessee *vs.* Darby, 12 Wheaton, p. 210, and 7 Curtis' Dig., p. 129.

THE CONTRACT AS CONSTRUED BY THE PARTIES TO IT.

Further: The Miller homestead had inception July 25, 1866. The Kansas Pacific Company commenced the work of construction in 1865, located its road opposite this land Sept. 21, 1866, and completed it to the full extent of the bonded portion by the 2d day of Nov., 1869. Such completion was found by this court in U. S. *vs.* Kan. Pac. R. W. Co., 99 U. S. Rep., at 457. The Union Pacific and Central Pacific roads were completed in ~~March~~, 1869.

It will thus be noted that the construction first established by the Department June 22, 1866, had been given prior to

Miller's homestead filing, and it was not changed until 1871, after the road had been accepted by the President to the extent of the bonded road.

The interpretation given to a contract by both parties whilst the work is in progress, if reasonable, will be generally adhered to by the courts in cases where one party seeks to establish another which is more favorable to himself.

"In a doubtful case, the interpretation which the parties themselves have, by their conduct, practically given their contract, will prevail."

Bishop on Contracts, par. 598.

"In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. * * * * In an executory contract, where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."

Chicago *vs.* Sheldon, 9 Wallace, at p. 54.

The same rule has been sanctioned by the law officer of the Executive Department of the Government.

Mr. Taney, afterwards Chief Justice of this Court, 2d Opinions of the Attorney General, 558, said:

"Whenever an act of Congress has, by actual decision or continued usage and practice, received a construction at the proper Department, and that construction has been acted on for a succession of years, it must be a strong and palpable case of error and injustice that would justify a change in the interpretation of it."

See also Attorney General Johnson's opinion of November, 1849, (5 Opinions, 187.)

It is believed that the Attorney General has generally adhered to this view. In a case where that officer departed from it, he was afterwards overtaken by disaster in court.

1st Blatchford, C. C. Rep., 218.

JUSTICE AND RIGHT IN THIS CASE.

It is safe in interpreting the statutes of the Government to recognize the principles of justice and right, and to assume that Congress does not intend a wrong either directly or remotely.

But it is very plain, that after the companies had completed their roads under the statutes, expecting and claiming the benefit of a fair interpretation, that if the interpretation be changed by the United States, the stronger party, and the weaker deprived of valuable concessions, serious wrong will be done. The area and value of lands to which homestead and pre-emption claims have been abandoned, since the definite location of the roads opposite them, is a very large item of property in the cases of all the principal companies that have built their roads under these laws.

The companies claim this property under that construction of the grants which prevailed whilst they were building their roads, and there is neither any moral, political, or economic reason why their rights in these premises should be curtailed for the benefit of third parties—the hangers-on about district land offices, who stand ready, when a claim of this kind has been of record eight or ten years, or perhaps longer, and the land has been made valuable, not by the improvements or cultivation of a settler, but by the building of the road and telegraph and the establishment of the business of the railroad company near by, to scoop up all the money value that has accrued to the land by the expenditure of the capital of the railroad companies.

Respectfully submitted,

HENRY BEARD,
Att'y for Cent. Pac. R. R. Co.

EXHIBITS.

EXHIBIT "A."

Extract from Annual Report of the General Land Office for 1866, p. 19.

"In reference to settlements on odd-numbered sections within the limits of withdrawals under railroad grants, the Department in June last ruled that the homestead settler's right attaches only from the date of entry, the pre-emptors from the date of his actual personal settlement. The title in either case is to be consummated by a full compliance with the terms and conditions imposed by law. The grant in aid of the railroad does not embrace lands to which a valid right arising either under the homestead or pre-emption law had previously attached, but if such right be abandoned or forfeited, the grant would immediately thereafter take effect; that a pre-emptor cannot change his claim to a homestead entry so as to defeat the right which may have inured to the railroad company before the individual entry was made. If a pre-emption settlement had been commenced upon surveyed lands, it might be entered as a homestead before the right of the company attached, but not at a subsequent date. This ruling has been duly communicated for the government of district land officers."

EXHIBIT "B."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *December* 11, 1878.

SIR: I have considered the case of T. H. Gates *vs.* California and Oregon Railroad Company, involving the right to lots 7, 8, 9, and 10, sec. 3, township 27 n., 3 w., Shasta, California, on appeal from your decision of July 2d, 1877, awarding the land to Gates.

This tract is within the twenty-mile or granted limits of the grant made to the company by the act of Congress, approved July 25, 1866, which took effect September 13, 1867.

The township plat was filed in the local land office, May 12, 1869.

The tract in question was occupied by Robert E. Warren, from September, 1866, until November 17, 1867. In my opinion, the evidence shows that he was a qualified pre-emptor, and that, prior to the time that the grant took effect, he had initiated a claim which was capable of being perfected. You held that this claim excepted the land from the grant, and awarded the same to Gates, the present occupant.

From this decision the company appealed.

There can be no doubt that, had Warren perfected his claim, initiated prior to the time that the grant took effect, when there was an opportunity, the tract would have been excepted from the operation of the said grant. In the case of Sherman *vs.* Buick, (3 Otto, 209,) the controversy was between a settler who had perfected his title from the United States and a purchaser from the State. The court held that the State of California took no title to sections 16 and 36, under the act of 1853, as against an actual settler before survey, claiming the benefits of the pre-emption laws, who perfected his claim by a patent from the United States.

In commenting upon this point in said case, the court, in the later case of Water and Mining Co. *vs.* Bugbey, (6 Otto, 165,) say: "As against all the world, except the pre-emption settler, the title of the United States passed to the State upon the completion of the surveys, and if the settler failed to assert his claim, or to make it good, the rights of the State became absolute."

As before stated, Warren, at the date the grant took effect, had a claim which he might have perfected; as a matter of fact, however, he failed to do so, but abandoned the same on the 17th November, 1867.

This raises the question: Did said claim place the tract in the *status* of land pre-empted at the date the grant took effect? If so, your decision is correct, and must be sustained, for the reason that the second section of the granting act provides that "when any of the said alternate sections, or parts of sections, shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof."

In the case of Sherman *vs.* Buick, the court went to the

extent of asserting that, as against all parties except the settler, the title of the United States to section 16 and 36, granted to the State by the act of March 3d, 1853, passed to the State upon the completion of the surveys, and, if the settler failed to assert his claim, or make it good, the right of the State became absolute.

The State of California, under the act of March 3d, 1853, stands in the same position, as a grantee of public lands, as the California and Oregon Railroad Company under the act of July 25, 1866.

Under the act of 1853, the State is entitled to indemnity, if, at the time the grant took effect, the lands granted are occupied by settlers who assert their claims.

Is there anything in the act of July 25, 1866, which places the railroad company, a grantee of the Government, in a different position? If it does occupy the same relative position, must not the same principle govern in the adjustment of the grant? I can see no reason why it should not; and, if so, it must be held that, Warren having failed to perfect his claim, the land passed to the railroad company, when its grant took effect.

The court, however, has not left the Department in doubt on this point. In the case of Water and Mining Co. *vs.* Bugbey, above cited, Bugbey was residing upon section 16, granted to the State of California by the act of March 3d, 1853, at the time the same was surveyed. He, however, failed to perfect his claim, after the land became subject to filing and cash entry, viz., at the date of survey, and the court held that, by reason of such failure, the right of the State attached.

The language of the court on this point is as follows, viz: "Here the company does not claim under the settler's title, but seeks, by means of it, to defeat that of the State, and thus leave the land in a condition to be operated upon by the act of July 26. The settler, however, was under no obligation to assert his claim, and he having abandoned it, the title of the State became absolute, *as of May* 19, 1866, when the surveys were completed."

Unless there is a different principle to be applied in the adjustment of the grant to the railroad company from that announced by the court as applicable to the school grant to the State of California, the claim of Gates must be rejected.

The 6th section of the act of March 3d, 1853, making the

grant to the State of California for school purposes is as follows, viz: "That all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be, and hereby are, granted to the State for the purposes of public schools in each township," &c.

The 7th section of the act provides: "That when any settlement, by the erection of a dwelling house, or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, other lands shall be selected by the proper authorities of the State in lieu thereof."

The Supreme Court, in the two cases above cited, establish the principle that this grant takes effect upon the survey of the land; that where a person settled prior to survey, and perfected his claim after such survey, the State is entitled to indemnity for the tract lost, but that where a party settles prior to survey, and fails to perfect his claim after that event, the land passes to the State as of the date of survey.

The section of the act of July 25, 1866, making a grant of land to the California and Oregon Railroad Company is as follows, viz: "That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line * * every alternate section of public land—not mineral—designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line, and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands designated as aforesaid shall be selected by said companies in lieu thereof, * * * and as soon as said companies, or either of them, shall file in the office of the Secretary of the Interior a map "of survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified."

It will be observed that this section makes a grant of public lands; defines when said grant shall take effect, viz, at the date of filing the map of the survey of said railroad; and provides when indemnity shall be taken, viz, when at

the time the grant takes effect, a tract is found to be pre-empted.

We thus find that, in all essential particulars, the grants are identical, and the principle being so clearly and firmly established that under the former grant the right of the State is not defeated by a pre-emption settlement made prior to survey, and in existence at that date, unless that claim is perfected by the said settler after survey, the same principle must apply in the grant to the railroad company.

In the case under consideration we find that Warren had a pre-emption settlement claim at the time the grant took effect capable of being perfected, but, as he abandoned the land, and failed to perfect the same, the right of the company attached as of the date when the grant took effect.

Your decision is therefore reversed, and the land awarded to the company.

I am aware that this ruling is contrary to that heretofore in force in this Department, which ruling was established in compliance with what was deemed a correct interpretation of the law, but the highest appellate judicial authority of the land has put a different construction upon the law, and under the theory of our Government this construction must be followed by the Executive Departments thereof.

This change of rule is prospective only in its operations. In no case where the decision of the Department, based upon a former ruling, has become final by promulgation, will it be changed or modified to conform to the ruling herein announced. Those cases will be deemed *res adjudicata*.

The papers in the case are herewith returned.

Very respectfully,

C. SCHURZ, *Secretary*.

The Commissioner of the General Land Office.

112 629

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 67.

THE KANSAS PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

LEWIS DUNMEYER.

SUPPLEMENTAL BRIEF.

HENRY BEARD,
Att'y for Cent. Pac. R. R. Co.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 67.

THE KANSAS PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

LEWIS DUNMEYER.

In Error to the Supreme Court of the State of Kansas.

As my first brief was prepared in great haste, and as I understand that this cause will not be considered further by the Court until after argument is heard in a somewhat similar case upon the docket, that will soon be reached, and as upon the oral argument of this cause there seemed to be an intimation by the Court that the case of Newhall *vs.* Sanger (92 U. S. Reps., 761) was in conflict with the contention of the plaintiff in error in this case, I beg to add to my former brief in the way of argument in this case the following:

I.

REMARKS CONCERNING THE NEWHALL VS. SANGER CASE.

The land in controversy in Dunmeyer's case *was public land* at the date of the grant, and remained public land until the grant to the railroad company took effect. It was, there-

fore, within the grant to the company, and the preliminary homestead entry of Miller, initiated July 25, 1866, subsequent to the date of the railroad grant, I claim, did not change the character of the land. It still remained public land, with the right of Miller, if he conformed to the law, to perfect the title against the company. By abandoning his homestead claim, his inchoate right, if any he had, was terminated, but the character of the land, as public land, had not in any manner been affected. The decision of this Court in Newhall *vs.* Sanger proceeded upon the ground expressly declared by the decision, that the land at the date of the grant to the railroad company and the withdrawal of lands, though within the defined limits of the railroad, was not public land at the date of the grant and withdrawal.

The Court stated the question in that case to be, whether lands within the boundaries of an alleged Mexican or Spanish grant, which was then (at date of railroad grant and withdrawal) *sub judice*, were "public within the meaning of the acts of Congress" making the grant,—and the decision was that they were not.

The Court say (p. 763): "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or disposal under general laws.

"That they were so employed in this instance is evident from the fact that to them alone could the order withdrawing lands from pre-emption, private entry and sale, apply."

The Court held that the withdrawal in that case did not apply to the lands claimed to be in a private grant. The *status* of such land, say the Court, "must be determined by the condition of things which existed *in California* at the time it was ceded, *and by our subsequent legislation.* The rights of private property were fully secured by the law of nations as well as by treaty stipulation."

The reasoning of the court reaches its conclusion (pp. 764, 765) in the statement that "*our legislation was so shaped* that no title could be initiated under the laws of the United States

to lands covered by a Spanish or Mexican claim until it was barred by lapse of time or rejected. This is, in our opinion, the true interpretation of the act of 1851."

This reasoning does not apply to the case of Dunmeyer. His land is in Kansas. There is no act of March 3d, 1851, relating to private claims in California, applicable to it. It was public land of the United States in 1862 and 1866, and in a condition to pass by a grant or to be disposed of under general laws. In protecting private claims in *California* from adverse public grant or disposal, the court was applying the laws enacted in respect to those claims, and those extending the land system to California. It maintained these to the discomfiture alike of grants, pre-emptions, and homesteads, holding that the lands were not *public* until the private claim was barred or rejected, and then they were made public lands by the provisions of the same act of March 3d, 1851, which before that had the effect to withhold them from the category of "public lands." And this construction was given in support of those rights of private property in the soil, secured by the law of nations as well as by treaty stipulation. (Treaty of 1848.)

If anything, those rights were vested at and before the Mexican treaty. The United States land officers could not sell those lands, nor Congress grant them. And this was the nature of the claim of title which, say the court, Congress by law protected against public sales and grants until such private claims expired or were rejected. The reservation of the lands was a statutory one, extending from the acquisition of California until the rejection of the claim.

II.

THE HOMESTEAD RIGHT MUST BE ACQUIRED, IF AT ALL, IN PUBLIC LAND.

There is a broad and plain distinction between the private land claim in California under laws withholding the land

from the public domain and a preliminary homestead, which, to be of any inceptive virtue, must be made on "*public land*"—"*unappropriated*" public land. (R. S., Sec. 2289.)

But the homestead on public land, I have contended in my first brief, was not of such a nature as to vest a right or interest until the party complied with the law and made his proof, so as to have the right to demand the patent certificate. I have cited the provisions of the homestead law, which in so marked a degree follow those of the prior act of 1850, sec. 4, making donations of land in Oregon and Washington Territories. (9th Stat., p. 496.)

In construing said donation law of 1850, this Court decided that, "under section 4, there was no grant to a settler until he had qualified himself to take as a grantee by completing his four years of residence and cultivation, and performing such other acts in the meantime as the statute required in order to protect his claim and keep it alive. Down to that time he was an authorized settler on the public land, but not a grantee."

Hall *vs.* Russell, 101 U. S., at p. 512.

In Vance *vs.* Burbank it was held that a "wife or her heirs get nothing under that act before her husband, or some one for him, proves up the claim."

101 U. S. Rep., 514.

This Court has in several cases defined the nature of a pre-emption claim to public lands.

In Hosmer *vs.* Wallace, (97 U. S. Rep., p. 575,) the Court said—page 581—in a case where a special act had made special provisions for the disposal of the land in contest: "No vested right in the land could be acquired by anyone until it was open to settlement, *nor afterwards* unless the pre-emptor made his entry and obtained a patent certificate before the passage of the act;" and the cases of Frisbie *vs.* Whitney (9 Wallace, 187) and the Yosemite case (15 Wallace, p. 77) are referred to as having settled this.

Thus this Court has repeatedly adjudged that the pre-emptor has attained no vested right in public land until compliance with the law and proof thereof, and, also, as to the Oregon donation claimants the same conclusion has been reached.

All the reasoning applying in these cases applies to that of the homestead claimant. His claim is initiated in unappropriated public land, and he obtains no vested interest until after compliance and proof thereof, as required by law. If he fails or abandons, his claim is as though it had never been. There is no authority of law for any public officer thereafter to recognize any right under it, or to give any force or effect to it. The land officers are not clothed with authority to find partial compliance, or determine whether partial compliance secures anything to the claimant, or to do or decide anything after the claim has expired or has been abandoned.

The homestead law does not provide for the deliverance to the claimant of any paper or certificate, until he has made proof of full compliance with the law.

It is in all these regards similar to the donation under the law of 1850, and the pre-emption under the act of the 4th of September, 1841.

III.

THE GRANT TO THE RAILROAD COMPANY TOOK EFFECT.

"That there be, and is hereby, granted to the said company * * * every alternate section of public land designated by odd numbers to the amount of five alternate sections per mile on each side of said railroad."

These are the words of grant in the act of Congress, and the date of the grant is July 1, 1862. At that date the tract in contest here was public land. There was no existing statutory reservation of it to satisfy private land claims, (as in Newhall *vs.* Sanger.)

As public land the grant applied, and on completion of the conditions of the grant, as the tract in contest lies within two miles of the line of road, the company acquired the right to a patent therefor, unless the tract was specially excepted from the effect of such grant. "Subject to such exceptions, the grant passed to the company a present interest in every odd-numbered section of public land within specified limits on each side of the line of the road."

I understand this Court to have so decided in M. K. & T. Company *vs.* Kansas Pac. R. W. Co., 97 U. S., 491; R. R. Company *vs.* Baldwin, 103 U. S., 426.

The case of the pl'ff in error cannot fail here on any suggestion that the tract was not public land—for it was. If it fails at all, it must be because, though public land, it was excepted by the terms of limitation in the grant. And that it was not so excepted I have contended in my former brief.

IV.

DECISIONS OF THIS COURT ARE NOW REFERRED TO AS SETTLING THE QUESTION.

In the case of Sherman *vs.* Buick, 93 U. S., 209, the decision of this Court is in harmony with the above line of reasoning. The court held, that the "rule governing the right of pre-emption on school sections (in California) is provided by the 7th section of the act (M'c'h 3, 1853, 10 Stat., 246), and it protects a settlement, if the surveys when made ascertain its location to be on a school section" (*Syllabus.*) In that case the settler perfected his claim under the pre-emption laws—and the Court sustained his title as against the State claimant under the school grant. The settlement and improvement were established by evidence and ascertained "in the proper mode by the proper officer of the United States." (The Court at p. 214.) This was the case of a pre-emptor who had initiated his claim prior to the

school grant, and continued afterwards to fulfill the law and obtained his patent certificate. The railroad companies have no contention with such claimants. Their rights are cheerfully conceded. But when having initiated a claim they fail to fulfill the law or abandon, then the railroad grant takes effect.

On this point the case of Water and Mining Co. *vs.* Bugby, 96 U. S. Rep., 165, is directly in point. The court say, p. 167:

"In Sherman *vs.* Buick it was decided that the State of California took no title to sections 16 and 36, under the act of 1853, as against an actual settler before survey claiming the benefit of the pre-emption laws who perfected his claim by patent from the United States. * * * In that case the controversy was between the settler who perfected his title from the United States and a purchaser from the State. Here the company does not claim under the settler's title, but seeks, by means of it, to defeat that of the State. * * The settler was, however, under no obligation to assert his claim, and he having abandoned it, the title of the State became absolute, as of May 19, 1866, when the surveys were completed."

This case is a direct authority for the conclusion of law I am contending for, that when Miller abandoned his incomplete homestead claim to the land, and bought it of the company, the title of the company became absolute.

On the authority of this case Secretary Schurz made the decision of December 11, 1878, printed as an exhibit to my first brief herein, p. 18. He also prescribed the regulation (still unchanged) of November 7th, 1879, quoted at p. 7 of my said brief, and found at length in the Annual Report of the General Land Office for 1879, p. 127.

In the subsequent case of Mining Company *vs.* Consolidated Mining Co., 102 U. S., p. 167, this court commented upon the two cases above cited, and maintained both decisions as consistent with each other and as sound in principle.

We want no better authority for the proposition herein

maintained than those two decisions. They are both in harmony with the interpretation given by Secretary Browning in 1867 of the correlative clauses in the U. P. land-grant acts of 1862 and 1864, applicable to the case at bar, and quoted in my first brief, p. 5.

V.

THE GENERAL THEORY OF THESE LAND GRANTS.

After the United States has made a present grant of alternate tracts, and increased the price of those left to the United States, it seems hostile to the general theory of all such grants that the Government shall thereafter sell any of the tracts designated for the grantee to parties who had no vested or initiative right prior to the taking effect of the grant. The price of the remaining sections was doubled to reimburse the treasury for the loss of the sale of the granted alternates, and the event justified the supposition that along the lines of railroads the sections remaining to the United States would sell more rapidly at the double minimum price than lands elsewhere at half the price.

The land-grant policy of this Government was instituted in 1850, and I assert, with confidence, that for twenty years the Government never sold a tract coming within the description of the grants, except to a claimant whose right was found to have attached prior to the grant.

To do so, is to destroy the alternation of the tracts, which it is the expressed intention to preserve and maintain.

This construction, so established by practice, was at first applied to the Union Pacific grants, and the omission therein of provisions increasing the price of the alternate even sections was supplied by the act of Congress of 6th March, 1868, [15 Stat., p. 39] quoted in full in the brief of counsel for the plaintiff in error.

Thereafter, if not before that time, the notion that the Government had retained odd-numbered alternates for sale at $1.25 per acre to newcomers, within the limits where the

even ones were held at double that price, was excluded. The solicitude of the Government in making the grant to protect citizens who had initiated claims to lands within the description of those granted, so that they might go forward and by complying with the law complete their rights, was statesmanlike and just. Can it be supposed that, like a wily Shylock, the Government had a purpose to re-enter and claim for itself the tracts that might be abandoned by these citizens? Such an intention cannot worthily be imputed to the statesmanship of Congress. Certainly not, where it is not found expressly in the law, and is generally inconsistent with the expressed object of the laws, viz, to *grant aid* to the companies, and to offer inducements to them to construct and equip the roads, and is likewise hostile to the general intention to grant the alternate odd sections and reserve to itself the even alternates. The use of the words "alternate" sections, designated by odd numbers, excludes the supposition that the United States has them for sale after the grant has been made. It has provided by law only for the sale of even sections. There is no such provision of law for selling alternate odd sections; no provision directing any odd-numbered tracts to be restored to market, or to pre-emption and homestead claim. If it had been understood in March, 1868, that the Government had title to a large quantity of land in the alternate odd-numbered sections withdrawn along the lines of the roads, provision would have been made then for their restoration to market and sale, as was therein made for the even-numbered sections. But it should be noted that in 1866 and 1867 Congress had been advised by the annual report and decisions of the Interior Department that unless disposed of to claimants, with rights of prior inception, the odd-numbered alternates could not be sold by the Government, but inured to the railroad companies under the then existing grants.

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